A/65/10

United Nations

Report of the International Law Commission

Sixty-second session
(3 May–4 June and 5 July–6 August 2010)

General Assembly

Official Records
Sixty-fifth session
Supplement No. 10 (A/65/10)

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United Nations • New York, 2010

Note

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

The word *Yearbook* followed by suspension points and the year (e.g. *Yearbook ... 1971*) indicates a reference to the *Yearbook of the International Law Commission*.

A typeset version of the report of the Commission will be included in Part Two of volume II of the *Yearbook of the International Law Commission 2010*.

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Chapter I
Introduction

1. The International Law Commission held the first part of its sixty-second session from 3 May to 4 June 2010 and the second part from 5 July to 6 August 2010 at its seat at the United Nations Office at Geneva. The session was opened by Mr. Ernest Petrič, Chairman of the sixty-first session of the Commission.

A. Membership

2. The Commission consists of the following members:

Mr. Ali Mohsen Fetais Al-Marri (Qatar)

Mr. Lucius Caflisch (Switzerland)

Mr. Enrique J.A. Candioti (Argentina)

Mr. Pedro Comissário Afonso (Mozambique)

Mr. Christopher John Robert Dugard (South Africa)

Ms. Paula Escarameia (Portugal)

Mr. Salifou Fomba (Mali)

Mr. Giorgio Gaja (Italy)

Mr. Zdzislaw Galicki (Poland)

Mr. Hussein A. Hassouna (Egypt)

Mr. Mahmoud D. Hmoud (Jordan)

Mr. Huikang Huang (China)

Ms. Marie G. Jacobsson (Sweden)

Mr. Maurice Kamto (Cameroon)

Mr. Fathi Kemicha (Tunisia)

Mr. Roman Anatolyevitch Kolodkin (Russian Federation)

Mr. Donald M. McRae (Canada)

Mr. Teodor Viorel Melescanu (Romania)

Mr. Shinya Murase (Japan)

Mr. Bernd H. Niehaus (Costa Rica)

Mr. Georg Nolte (Germany)

Mr. Bayo Ojo (Nigeria)

Mr. Alain Pellet (France)

Mr. A. Rohan Perera (Sri Lanka)

Mr. Ernest Petrič (Slovenia)

Mr. Gilberto Vergne Saboia (Brazil)

Mr. Narinder Singh (India)

Mr. Eduardo Valencia-Ospina (Colombia)

Mr. Edmundo Vargas Carreño (Chile)

Mr. Stephen C. Vasciannie (Jamaica)

Mr. Marcelo Vázquez-Bermúdez (Ecuador)

Mr. Amos S. Wako (Kenya)

Mr. Nugroho Wisnumurti (Indonesia)

Sir Michael Wood (United Kingdom)

B. Casual vacancy

3. On 14 July 2010, the Commission elected Mr. Huikang Huang (China) to fill the casual vacancy occasioned by the resignation of Ms. Hanqin Xue[1] who was elected to the International Court of Justice.

C. Officers and the Enlarged Bureau

4. At its 3036th and 3058th[2] meetings, on 3 May 2010 and 5 July 2010, the Commission elected the following officers:

Chairman:	Ms. Hanqin Xue (China) and Mr. Nugroho Wisnumurti (Indonesia)[3]
First Vice-Chairman:	Mr. Christopher John Robert Dugard (South Africa)
Second Vice-Chairman:	Mr. Zdzislaw W. Galicki (Poland)
Chairman of the Drafting Committee:	Mr. Donald M. McRae (Canada)
Rapporteur:	Mr. Stephen C. Vasciannie (Jamaica)

5. The Enlarged Bureau of the Commission was composed of the officers of the present session, the previous Chairmen of the Commission[4] and the Special Rapporteurs.[5]

6. On the recommendation of the Enlarged Bureau, the Commission set up a Planning Group composed of the following members: Mr. C.J.R. Dugard (Chairman), Mr. L. Caflisch, Mr. E. Candioti, Mr. P. Comissário Afonso, Ms. P. Escarameia, Mr. G. Gaja, Mr. Z. Galicki, Mr. H.A. Hassouna, Mr. M.D. Hmoud, Ms. M.G. Jacobsson, Mr. M. Kamto, Mr. R.A. Kolodkin, Mr. D.M. McRae, Mr. S. Murase, Mr. G. Nolte, Mr. A. Pellet, Mr. A.R. Perera, Mr. E. Petrič, Mr. G.V. Saboia, Mr. N. Singh, Mr. E. Valencia-Ospina, Mr. E. Vargas Carreño, Mr. M. Vázquez-Bermúdez, Mr. N. Wisnumurti, Mr. M. Wood, Ms. H. Xue, and Mr. S.C. Vasciannie (*ex officio*).

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[1] See document A/CN.4/632 and Add.1.

[2] See below, footnote 3.

[3] At its 3058th meeting on 5 July 2010, the Commission elected Mr. Nugroho Wisnumurti as the new Chairman for the remainder of the session to replace Ms. Hanqin Xue.

[4] Mr. E. Candioti, Mr. Z. Galicki, Mr. T.V. Melescanu, Mr. A. Pellet, Mr. E. Petrič and Mr. E. Vargas Carreño.

[5] Mr. L. Caflisch, Mr. G. Gaja, Mr. Z. Galicki, Mr. M. Kamto, Mr. R.A. Kolodkin, Mr. A. Pellet and Mr. E. Valencia-Ospina.

D. Drafting Committee

7. At its 3038th, 3040th, 3058th and 3059th meetings, on 5 and 7 May, and on 5 and 9 July 2010, respectively, the Commission established a Drafting Committee, composed of the following members for the topics indicated:

(a) *Reservations to treaties*: Mr. D.M. McRae (Chairman), Mr. A. Pellet (Special Rapporteur), Mr. S. Fomba, Mr. G. Gaja, Mr. M.D. Hmoud, Mr. H. Huang, Mr. T.V. Melescanu, Mr. M. Vázquez-Bermúdez, Mr. N. Wisnumurti, Mr. M. Wood, Ms. H. Xue and Mr. S.C. Vasciannie (*ex officio*).

(b) *Expulsion of aliens*: Mr. D.M. McRae (Chairman), Mr. M. Kamto (Special Rapporteur), Mr. L. Caflisch, Mr. P. Comissário Afonso, Mr. C.J.R. Dugard, Mr. S. Fomba, Mr. G. Gaja, Mr. Z. Galicki, Mr. M.D. Hmoud, Ms. M.G. Jacobsson, Mr. B. Niehaus, Mr. G. Nolte, Mr. A.R. Perera, Mr. E. Petrič, Mr. G.V. Saboia, Mr. N. Singh, Mr. E. Valencia-Ospina, Mr. E. Vargas Carreño, Mr. M. Vázquez-Bermúdez, Mr. N. Wisnumurti, Mr. M. Wood, Ms. H. Xue and Mr. S.C. Vasciannie (*ex officio*).

(c) *Protection of persons in the event of disasters*: Mr. D.M. McRae (Chairman), Mr. E. Valencia-Ospina (Special Rapporteur), Mr. C.J.R. Dugard, Mr. S. Fomba, Mr. G. Gaja, Mr. H.A. Hassouna, Ms. M.G. Jacobsson, Mr. M. Kamto, Mr. T.V. Melescanu, Mr. S. Murase, Mr. G. Nolte, Mr. A.R. Perera, Mr. E. Petrič, Mr. G.V. Saboia, Mr. N. Singh, Mr. E. Vargas Carreño, Mr. M. Vázquez-Bermúdez, Mr. N. Wisnumurti, Mr. M. Wood and Mr. S.C. Vasciannie (*ex officio*).

(d) *Effects of armed conflicts on treaties*: Mr. D.M. McRae (Chairman), Mr. L. Caflisch (Special Rapporteur), Mr. E. Candioti, Mr. S. Fomba, Mr. G. Gaja, Mr. M.D. Hmoud, Mr. H. Huang, Ms. M.G. Jacobsson, Mr. M. Kamto, Mr. T.V. Melescanu, Mr. S. Murase, Mr. B.H. Niehaus, Mr. G. Nolte, Mr. A.R. Perera, Mr. G.V. Saboia, Mr. M. Vázquez-Bermúdez, Mr. N. Wisnumurti, Mr. M. Wood and Mr. S.C. Vasciannie (*ex officio*).

8. The Drafting Committee held a total of 37 meetings on the four topics indicated above.

E. Working Groups and Study Groups

9. At its 3037th, 3038th, 3039th, 3053rd and 3069th meetings, on 4, 5, 6 and 28 May and on 27 July 2010, respectively, the Commission reconstituted the following Working Groups and Study Groups:

(a) *Working Group on Shared natural resources*: Mr. E. Candioti (Chairman), Mr. L. Caflisch, Ms. P. Escarameia, Mr. S. Fomba, Mr. G. Gaja, Mr. Z. Galicki, Mr. H. Hassouna, Mr. M.D. Hmoud, Ms. M.G. Jacobsson, Mr. R.A. Kolodkin, Mr. D.M. McRae, Mr. S. Murase, Mr. A.R. Perera, Mr. E. Petrič, Mr. G.V. Saboia, Mr. N. Singh, Mr. E. Valencia-Ospina, Mr. A.S. Wako, Mr. N. Wisnumurti, Mr. M. Wood, Ms. H. Xue and Mr. S.C. Vasciannie (*ex officio)*.

(b) *Working Group on the Obligation to extradite or prosecute* (*aut dedere aut judicare*), open-ended: Mr. A. Pellet (Chairman),[6] Mr. Z. Galicki (Special Rapporteur) and Mr. S.C. Vasciannie (*ex officio*).

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[6] In the absence of its Chairman, the Working Group was chaired by Mr. E. Candioti at the present session.

(c) The *Working Group on Long-term programme of work* for the quinquennium was established by the Planning Group and was composed of the following members: Mr. E. Candioti (Chairman), Mr. L. Caflisch, Mr. P. Comissário Afonso, Ms. P. Escarameia, Mr. S. Fomba, Mr. G. Gaja, Mr. Z. Galicki, Mr. H.A. Hassouna, Mr. M.D. Hmoud, Ms. M.G. Jacobsson, Mr. D.M. McRae, Mr. T.V. Melescanu, Mr. S. Murase, Mr. G. Nolte, Mr. A. Pellet, Mr. A.R. Perera, Mr. E. Petrič, Mr. G.V. Saboia, Mr. N. Singh, Mr. E. Valencia-Ospina, Mr. E. Vargas Carreño, Mr. M. Vázquez-Bermúdez, Mr. A.S. Wako, Mr. N. Wisnumurti, Mr. M. Wood, Ms. H. Xue and Mr. S.C. Vasciannie (*ex officio*).

(d) *Study Group on Treaties over time*: Mr. G. Nolte (Chairman), Mr. E. Candioti, Mr. C.J.R. Dugard, Ms. P. Escarameia, Mr. S. Fomba, Mr. G. Gaja, Mr. Z. Galicki, Mr. H.A. Hassouna, Mr. M.D. Hmoud, Ms. M.G. Jacobsson, Mr. R.A. Kolodkin, Mr. D.M. McRae, Mr. T.V. Melescanu, Mr. S. Murase, Mr. B.H. Niehaus, Mr. B. Ojo, Mr. A. Pellet, Mr. A.R. Perera, Mr. E. Petrič, Mr. N. Singh, Mr. E. Valencia-Ospina, Mr. E. Vargas Carreño, Mr. M. Vázquez-Bermúdez, Mr. A.S. Wako, Mr. N. Wisnumurti, Mr. M. Wood, Ms. H. Xue and Mr. S.C. Vasciannie (*ex officio*).

(e) *Study Group on the Most-Favoured Nation clause*: Mr. D.M. McRae and Mr. A.R. Perera (Co-Chairs), Mr. L. Caflisch, Mr. E. Candioti, Mr. S. Fomba, Mr. G. Gaja, Mr. H.A. Hassouna, Mr. M.D. Hmoud, Ms. M.G. Jacobsson, Mr. R.A. Kolodkin, Mr. S. Murase, Mr. G. Nolte, Mr. A. Pellet, Mr. G.V. Saboia, Mr. N. Singh, Mr. M. Vázquez-Bermúdez, Mr. A.S. Wako, Mr. N. Wisnumurti, Mr. M. Wood, Ms. H. Xue and Mr. S.C. Vasciannie (*ex officio*).

F. Secretariat

10. Ms. Patricia O'Brien, Under-Secretary-General, the Legal Counsel, represented the Secretary-General. Mr. Václav Mikulka, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Mr. George Korontzis, Deputy Director, served as Deputy Secretary. Mr. Trevor Chimimba and Mr. Arnold Pronto, Senior Legal Officers, served as Senior Assistant Secretaries. Mr. Pierre Bodeau-Livinec and Mr. Gionata Buzzini, Legal Officers, served as Assistant Secretaries to the Commission.

G. Agenda

11. At its 3036th meeting, on 3 May 2010, the Commission adopted an agenda for its sixty-second session consisting of the following items:

1. Organization of the work of the session.
2. Filling of casual vacancies.
3. Reservations to treaties.
4. Shared natural resources.
5. Effects of armed conflicts on treaties.
6. Expulsion of aliens.
7. The obligation to extradite or prosecute (*aut dedere aut judicare*).
8. Protection of persons in the event of disasters.
9. Immunity of State officiais from foreign criminal jurisdiction.
10. Treaties over time.

11. The Most-Favoured-Nation clause.
12. Programme, procedures and working methods of the Commission and its documentation.
13. Date and place of the sixty-third session.
14. Cooperation with other bodies.
15. Other business.

Chapter II
Summary of the work of the Commission at its sixty-second session

12. As regards the topic **"Reservations to treaties"**, the Commission had before it addendum 2 to the fourteenth report (A/CN.4/614/Add.2) as well as the fifteenth and sixteenth reports (A/CN.4/624 and Add.1 and 2, and A/CN.4/626 and Add.1, respectively) of the Special Rapporteur.

13. Addendum 2 to the fourteenth report and the fifteenth report considered the legal effects of reservations, acceptances of reservations and objections to reservations, as well as the legal effects of interpretative declarations and reactions thereto. Following a debate in plenary on these reports, the Commission referred 37 draft guidelines to the Drafting Committee. The sixteenth report considered the issue of reservations, objections to reservations, acceptances of reservations and interpretative declarations in relation to the succession of States. Following a debate in plenary, the Commission referred 20 draft guidelines, as contained in that report, to the Drafting Committee.

14. The Commission provisionally adopted 59 draft guidelines, together with commentaries, including 11 draft guidelines which had been provisionally adopted by the Drafting Committee at the sixty-first session and which deal with the freedom to formulate objections and with matters relating to the permissibility of reactions to reservations and of interpretative declarations and reactions thereto. The Commission thus completed the provisional adoption of the set of draft guidelines (chap. IV).

15. Concerning the topic **"Expulsion of aliens"**, the Commission had before it document A/CN.4/617, containing a set of draft articles on the protection of the human rights of persons who have been or are being expelled, revised and restructured by the Special Rapporteur in the light of the debate which had taken place in plenary during the sixty-first session of the Commission (2009). The Commission referred the revised draft articles 8 to 15, as contained in that document, to the Drafting Committee. The Commission also had before it the sixth report of the Special Rapporteur (A/CN.4/625 and Add.1), which considered collective expulsion, disguised expulsion, extradition disguised as expulsion, the grounds for expulsion, detention pending expulsion and expulsion proceedings. Following a debate in plenary, the Commission referred to the Drafting Committee draft articles A, 9, B1 and C1, as contained in the sixth report, and draft articles B and A1 as revised by the Special Rapporteur during the session. The Commission also had before it a new draft work plan with a view to restructuring the draft articles (A/CN.4/618), which had been presented by the Special Rapporteur to the Commission at its sixty-first session (2009), as well as comments and information received thus far from Governments (A/CN.4/604 and A/CN.4/628) (chap. V).

16. As regards the topic **"Effects of armed conflicts on treaties"**, the Commission commenced the second reading of the draft articles on the effects of armed conflicts on treaties (which had been adopted on first reading at its sixtieth session (2008)) on the basis of the first report of the Special Rapporteur (A/CN.4/627 and Add.1). Following a debate in plenary on the report of the Special Rapporteur, the Commission referred all the draft articles, and the annex, proposed by the Special Rapporteur to the Drafting Committee (chap. VI).

17. In relation to the topic **"Protection of persons in the event of disasters"**, the Commission had before it the third report of the Special Rapporteur (A/CN.4/629), dealing with the humanitarian principles of neutrality, impartiality and humanity, as well as the underlying concept of respect for human dignity. The report also considered the question of

the primary responsibility of the affected State to protect persons affected by a disaster on its territory, and undertook an initial consideration of the requirement that external assistance be provided on the basis of the consent of the affected State. Following a debate in plenary, the Commission decided to refer draft articles 6 to 8, as proposed by the Special Rapporteur, to the Drafting Committee. The Commission also adopted draft articles 1 to 5, which it had taken note of at its sixty-first session (2009), together with commentaries.

18. The Commission subsequently took note of four draft articles provisionally adopted by the Drafting Committee, relating to the humanitarian principles in disaster response, the inherent human dignity of the human person, the obligation to respect the human rights of affected persons, and the role of the affected State, respectively (A/CN.4/L.776) (chap. VII).

19. As regards the topic **"The obligation to extradite or prosecute (*aut dedere aut judicare*)"**, the Commission reconstituted the Working Group. The Working Group continued its discussions with the aim of specifying the issues to be addressed to further facilitate the work of the Special Rapporteur. It had before it a Survey of multilateral conventions which may be of relevance for the Commission's work on the topic, prepared by the Secretariat (A/CN.4/630), and a working paper prepared by the Special Rapporteur (A/CN.4/L.774) containing some observations and suggestions based on the general framework proposed in 2009 and drawing upon the survey by the Secretariat (chap. VIII).

20. Concerning the topic **"Immunity of State officials from foreign criminal jurisdiction"**, the Commission did not consider it in the course of the present session (chap. IX).

21. In relation to the topic **"Treaties over time"**, the Commission reconstituted the Study Group on Treaties over time. The Study Group began its work on the aspects of the topic relating to subsequent agreements and practice, on the basis of an introductory report prepared by its Chairman on the relevant jurisprudence of the International Court of Justice and of arbitral tribunals of ad hoc jurisdiction. A variety of issues relating to the significance and role of subsequent agreements and practice in the interpretation of treaties, and possibly also in their modification, were touched upon in the discussions (chap. X).

22. As regards the topic **"The Most-favoured-nation clause"**, the Commission reconstituted the Study Group on the Most-Favoured-Nation clause. The Study Group considered and reviewed the various papers prepared on the basis of the framework which had been agreed upon in 2009, including a catalogue of MFN provisions and papers on the 1978 draft articles, the practice of GATT and WTO, the work of OECD and UNCTAD on MFN, and the "*Maffezini*" issue, and set out a programme of work for next year (chap. XI).

23. In relation to the topic **"Shared natural resources"**, the Commission once more established the Working Group on Shared natural resources. The Working Group continued its assessment on the feasibility of future work on oil and gas on the basis of a working paper (A/CN.4/621). The working group considered all aspects of the matter, taking into account the views of governments, including as reflected in the working paper, as well as in light of its previous discussions. The Commission endorsed the recommendation of the Working Group that the Commission should not take up the consideration of the oil and gas aspects of the topic "Shared natural resources" (chap. XII).

24. Concerning **"Other matters"**, the Commission, pursuant to its 2009 decision, devoted a discussion to "Settlement of disputes clauses". It had before it a Note on Settlement of disputes clauses, prepared by the Secretariat (A/CN.4/623). The Commission decided to continue debate on the issue under "Other matters" at its next session. It was also agreed that a member of the Commission would prepare a working paper for that purpose (chap. XIII, sect. A.1). The Commission set up the Planning Group to consider its programme, procedures and working methods (chap. XIII, sect. A). The Working Group on

the Long-term programme of work was reconstituted (chap. XIII, sect. A.3). The Commission decided that its sixty-third session be held in Geneva from 26 April to 3 June and 4 July to 12 August 2011 (chap. XIII, sect. B).

Chapter III
Specific issues on which comments would be of particular interest to the Commission

A. Reservations to treaties

25. The Commission would particularly welcome comments from States and international organizations on the draft guidelines adopted this year and draws their attention in particular to the draft guidelines in sections 4.2 (Effects of an established reservation) and 4.5 (Consequences of an invalid reservation) of the Guide to Practice.[7]

B. Treaties over time

26. The Commission, in its consideration of the topic "Treaties over time", attempts to clarify the practical and legal significance of "subsequent agreements" and the "subsequent practice" of the parties as a means of the interpretation and application of treaties (article 31 (3) (a) and (b) of the Vienna Convention on the Law of Treaties). A detailed description of the topic "Treaties over time" is contained in Annex A to the report of the Commission on its sixtieth session (2008) (document A/63/10, available at: http://untreaty.un.org/ilc/reports/2008/2008report.htm).

27. For this purpose, the Commission requests States to provide it with one or more examples of "subsequent agreements" or "subsequent practice" which are or have been particularly relevant in the interpretation and application of their treaties.

28. In this context, the Commission would also be interested in instances of interpretation which involved taking into account other factors arising after the entry into force of the treaty (factual or legal developments).

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[7] See chapter IV, section C.2, below.

Chapter IV
Reservations to treaties

A. Introduction

29. The Commission, at its forty-fifth session (1993), decided to include the topic "The law and practice relating to reservations to treaties"[8] in its programme of work and, at its forty-sixth session (1994), appointed Mr. Alain Pellet Special Rapporteur for the topic.[9]

30. At the forty-seventh session (1995), following the Commission's consideration of his first report,[10] the Special Rapporteur summarized the conclusions drawn, including a change of the title of the topic to "Reservations to treaties"; the form of the results of the study to be undertaken, which should be a guide to practice in respect of reservations; the flexible way in which the Commission's work on the topic should be carried out; and the consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions on the law of treaties.[11] In the view of the Commission, those conclusions constituted the results of the preliminary study requested by the General Assembly in resolutions 48/31 of 9 December 1993 and 49/51 of 9 December 1994. The Guide to Practice would take the form of draft guidelines with commentaries, which would be of assistance for the practice of States and international organizations; the guidelines would, if necessary, be accompanied by model clauses. At the same session (1995), the Commission, in accordance with its earlier practice,[12] authorized the Special Rapporteur to prepare a detailed questionnaire on reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which were depositaries of multilateral conventions. The questionnaire was sent to the addressees by the Secretariat. In its resolution 50/45 of 11 December 1995, the General Assembly took note of the Commission's conclusions, inviting it to continue its work along the lines indicated in its report and also inviting States to answer the questionnaire.[13]

31. At its forty-eighth (1996) and its forty-ninth (1997) sessions, the Commission had before it the Special Rapporteur's second report,[14] to which was annexed a draft resolution on reservations to multilateral normative treaties, including human rights treaties, which was addressed to the General Assembly for the purpose of drawing attention to and clarifying the legal aspects of the matter.[15] At the latter session (1997), the Commission adopted preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties.[16] In its resolution 52/156 of 15 December 1997, the General Assembly took note of the Commission's preliminary conclusions and of its invitation to all treaty bodies set up by normative multilateral treaties that might wish to do

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[8] The General Assembly, in its resolution 48/31 of 9 December 1993, endorsed the decision of the Commission.

[9] *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10* (A/49/10), para. 382.

[10] A/CN.4/70 and Corr.1.

[11] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/10), para. 491.

[12] See *Yearbook ... 1993*, vol. II (Part Two), para. 286.

[13] As of 31 July 2010, 33 States and 26 international organizations had answered the questionnaire.

[14] A/CN.4/477 and Add.1.

[15] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), para. 137.

[16] *Ibid., Fifty-second Session, Supplement No. 10* (A/52/10), para. 157.

so to provide, in writing, their comments and observations on the conclusions, while drawing the attention of Governments to the importance for the Commission of having their views on the preliminary conclusions.

32. From its fiftieth session (1998) to its sixty-first session (2009), the Commission considered 12 more reports[17] and a note[18] by the Special Rapporteur[19] and provisionally adopted 140 draft guidelines and the commentaries thereto.

B. Consideration of the topic at the present session

33. At the present session, the Commission had before it a second addendum to the fourteenth report of the Special Rapporteur (A/CN.4/614/Add.2), which it considered at its 3036th to its 3038th meetings on 3 to 5 May 2010, and at its 3042nd, 3043rd and 3045th meetings on 11, 12 and 17 May 2010; the Special Rapporteur's fifteenth report (A/CN.4/624 and Add.1 and 2), which it considered at its 3042nd and 3043rd meetings, on 11 and 12 May 2010, at its 3045th to 3047th meetings, from 17 to 19 May 2010, and at its 3064th to 3067th meetings, from 14 to 16 and on 20 July 2010; and, lastly, the Special Rapporteur's sixteenth report (A/CN.4/626 and Add. 1), which it considered at its 3046th to 3050th meetings, from 18 to 25 May 2010, and its 3052nd and 3054th meetings, on 27 May and 1 June 2010. The Commission also had before it a memorandum by the Secretariat on reservations to treaties in the context of succession of States (A/CN.4/616), which had been submitted in 2009.

34. At its 3042nd meeting, on 11 May 2010, the Commission decided to refer draft guidelines 4.1, 4.1.1, 4.1.2 and 4.1.3 to the Drafting Committee.

35. At its 3045th meeting, on 17 May 2010, the Commission decided to refer draft guidelines 4.2, 4.2.1, 4.2.2, 4.2.3, 4.2.4, 4.2.5, 4.2.6 and 4.2.7 to the Drafting Committee.

36. At its 3047th meeting, on 19 May 2010, the Commission decided to refer draft guidelines 4.3, 4.3.1, 4.3.2, 4.3.3, 4.3.4, 4.3.5, 4.3.6, 4.3.7, 4.3.8 (in the revised version submitted by the Special Rapporteur),[20] 4.3.9, 4.4, 4.4.1, 4.4.2 and 4.4.3 to the Drafting Committee.

37. At its 3051st meeting, on 26 May 2010, the Commission considered and provisionally adopted the following draft guidelines: 2.6.3 (Freedom to formulate objections), 2.6.4 (Freedom to oppose the entry into force of the treaty *vis-à-vis* the author of the reservation), 3.4.1 (Permissibility of the acceptance of a reservation), 3.4.2 (Permissibility of an objection to a reservation), 3.5 (Permissibility of an interpretative declaration), 3.5.1 (Permissibility of an interpretative declaration which is in fact a reservation), 3.5.2 (Conditions for the permissibility of a conditional interpretative declaration), 3.5.3 (Competence to assess the permissibility of a conditional interpretative declaration), 3.6 (Permissibility of reactions to interpretative declarations), 3.6.1 (Permissibility of approvals of interpretative declarations) and 3.6.2 (Permissibility of

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[17] Third report (A/CN.4/491 and Corr.1 (English only), Add.1, Add.2 and Corr.1, Add.3 and Corr.1 (A/F/R only), Add.4 and Corr.1, Add.5 and Add.6 and Corr.1); fourth report (A/CN.4/499); fifth report (A/CN.4/508, Add.1-4); sixth report (A/CN.4/518 and Add.1-3); seventh report (A/CN.4/526 and Add.1-3); eighth report (A/CN.4/535 and Add.1); ninth report (A/CN.4/544); tenth report (A/CN.4/558 and Corr.1, Add.1 and Corr.1 and Add.2); eleventh report (A/CN.4/574); twelfth report (A/CN.4/584); thirteenth report (A/CN.4/600); and fourteenth report (A/CN.4/614 and Add.1).

[18] A/CN.4/586.

[19] For a detailed historical presentation, see *Official Records, Fifty-ninth Session, Supplement No. 10* (A/59/10), paras. 257–269.

[20] See footnote 44 below.

oppositions to interpretative declarations). At the same meeting, the Commission also adopted the title of section 3.4 of the Guide to Practice (Permissibility of reactions to reservations).

38. At its 3054th meeting, on 1 June 2010, the Commission decided to refer draft guidelines 5.1, 5.2, 5.3, 5.4, 5.5, 5.6, 5.7, 5.8, 5.9, 5.10, 5.11, 5.12, 5.13, 5.14, 5.15, 5.16, 5.16 *bis*, 5.17, 5.18 and 5.19 to the Drafting Committee.

39. At its 3058th meeting, on 5 July 2010, the Commission considered and provisionally adopted the following draft guidelines: 4.1 (Establishment of a reservation with regard to another State or organization), 4.1.1 (Establishment of a reservation expressly authorized by a treaty), 4.1.2 (Establishment of a reservation to a treaty which has to be applied in its entirety), 4.1.3 (Establishment of a reservation to a constituent instrument of an international organization), 4.2.1 (Status of the author of an established reservation), 4.2.2 (Effect of the establishment of a reservation on the entry into force of a treaty), 4.2.3 (Effect of the establishment of a reservation on the status of the author as a party to the treaty), 4.2.4 (Effect of an established reservation on treaty relations), 4.2.5 (Non-reciprocal application of obligations to which a reservation relates), 4.3 (Effect of an objection to a valid reservation), 4.3.1 (Effect of an objection on the entry into force of the treaty as between the author of the objection and the author of a reservation), 4.3.2 (Entry into force of the treaty between the author of a reservation and the author of an objection), 4.3.3 (Non-entry into force of the treaty for the author of a reservation when unanimous acceptance is required), 4.3.4 (Non-entry into force of the treaty as between the author of a reservation and the author of an objection with maximum effect), 4.3.5 (Effect of an objection on treaty relations), 4.3.6 (Effect of an objection on provisions other than those to which the reservation relates), 4.3.7 (Right of the author of a valid reservation not to be compelled to comply with the treaty without the benefit of its reservation), 4.4.1 (Absence of effect on rights and obligations under another treaty), 4.4.2 (Absence of effect on rights and obligations under customary international law) and 4.4.3 (Absence of effect on a peremptory norm of general international law (*jus cogens*)). At the same meeting, the Commission also adopted the title of section 4 (Legal effects of reservations and interpretative declarations), section 4.2 (Effects of an established reservation) and section 4.4 (Effect of a reservation on rights and obligations outside of the treaty) of the Guide to Practice.

40. At its 3061st meeting, on 8 July 2010, the Commission considered and provisionally adopted the following draft guidelines: 5.1.1 [5.1],[21] (Newly independent States), 5.1.2 [5.2] (Uniting or separation of States), 5.1.3 [5.3] (Irrelevance of certain reservations in cases involving a uniting of States), 5.1.4 (Establishment of new reservations formulated by a successor State), 5.1.5 [5.4] (Maintenance of the territorial scope of reservations formulated by the predecessor State), 5.1.6 [5.5] (Territorial scope of reservations in cases involving a uniting of States), 5.1.7 [5.6] (Territorial scope of reservations of the successor State in cases of succession involving part of a territory), 5.1.8 [5.7] (Timing of the effects of non-maintenance by a successor State of a reservation formulated by the predecessor State), 5.1.9 [5.9] (Late reservations formulated by a successor State), 5.2.1 [5.10] (Maintenance by the successor State of objections formulated by the predecessor State), 5.2.2 [5.11] (Irrelevance of certain objections in cases involving a uniting of States), 5.2.3 [5.12] (Maintenance of objections to reservations of the predecessor State), 5.2.4 [5.13] (Reservations of the predecessor State to which no objections have been made), 5.2.5 [5.14]

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[21] In the present chapter the guideline numbers in square brackets are the guideline numbers as they appeared in the Special Rapporteur's report or, in some cases, the original number of a guideline as it appeared in the report of the Special Rapporteur and was subsequently incorporated in a final guideline.

(Capacity of a successor State to formulate objections to reservations), 5.2.6 [5.15] (Objections by a successor State other than a newly independent State in respect of which a treaty continues in force), 5.3.1 [5.16 *bis*] (Maintenance by a newly independent State of express acceptances formulated by the predecessor State), 5.3.2 [5.17] (Maintenance by a successor State other than a newly independent State of express acceptances formulated by the predecessor State), 5.3.3 [5.18] (Timing of the effects of non-maintenance by a successor State of an express acceptance formulated by the predecessor State), and 5.4.1 [5.19] (Interpretative declarations formulated by the predecessor State). At the same meeting the Commission also adopted the titles of sections 5 (Reservations, acceptances of and objections to reservations, and interpretative declarations in the case of succession of States), 5.1 (Reservations and succession of States), 5.2 (Objections to reservations and succession of States), 5.3 (Acceptances of reservations and succession of States) and 5.4 (Interpretative declarations and succession of States) of the Guide to Practice.

41. At its 3067th meeting, on 20 July 2010, the Commission referred draft guidelines 3.3.3, 3.3.4, 4.5.1, 4.5.2, 4.5.3, 4.5.4, 4.6, 4.7, 4.7.1, 4.7.2 and 4.7.3 to the Drafting Committee.

42. At its 3069th meeting, on 27 July 2010, the Commission considered and provisionally adopted the following guidelines: 3.3.2 [3.3.3] (Effect of individual acceptance of an impermissible reservation), 3.3.3 [3.3.4] (Effect of collective acceptance of an impermissible reservation), 4.5.1 [3.3.2, later 4.5.1 and 4.5.2] (Nullity of an invalid reservation), 4.5.2 [4.5.3] (Status of the author of an invalid reservation in relation to the treaty), 4.5.3 [4.5.4] (Reactions to an invalid reservation), 4.6 (Absence of effect of a reservation on the relations between the other parties to the treaty), 4.7.1 [4.7 and 4.7.1] (Clarification of the terms of the treaty by an interpretative declaration), 4.7.2 (Effect of the modification or the withdrawal of an interpretative declaration in respect of its author) and 4.7.3 (Effect of an interpretative declaration approved by all the contracting States and contracting organizations). At the same meeting the Commission also adopted the titles of sections 4.5 (Consequences of an invalid reservation) and 4.7 (Effect of an interpretative declaration) of the Guide to Practice.

43. At its 3073rd, 3074th and 3076th to 3078th meetings, from 3 to 5 August 2010, the Commission adopted the commentaries to the above-mentioned draft guidelines.

44. The texts of the draft guidelines and commentaries thereto are reproduced in section C.2 below.

45. Having provisionally adopted the entire set of draft guidelines of the Guide to Practice on Reservations to Treaties, the Commission intends to adopt the final version of the Guide to Practice during its sixty-third session (2011). In doing so, the Commission will take into consideration the observations of States and international organizations as well as the organs with which the Commission cooperates, made since the beginning of the examination of the topic, together with further observations received by the Secretariat of the Commission before 31 January 2011.

46. At its 3078th meeting, on 5 August 2010, the Commission expressed its deep appreciation for the outstanding contribution the Special Rapporteur, Mr. Alain Pellet, had made to the treatment of the topic through his scholarly research and vast experience, thus enabling the Commission to provisionally adopt the complete Guide to Practice on Reservations to Treaties.

1. Introduction by the Special Rapporteur of the second addendum to his fourteenth report and of his fifteenth report

47. The second addendum to the fourteenth report (A/CN.4/614/Add.2) and the fifteenth report (A/CN.4/624 and Add.1 and 2) dealt with a central question that was to form the

subject matter of the fourth part of the Guide to Practice. At issue were the legal effects of reservations, acceptances and objections, on the one hand, and the legal effects of interpretative declarations and of reactions to such declarations on the other. The question of whether a reservation or interpretative declaration was capable of producing the intended effects depended on its formal validity and permissibility as well as on the reactions of the other States and international organizations concerned. More specifically, with regard to the effects of reservations and reactions to them, the Special Rapporteur had remained faithful to the approach endorsed by the Commission of not reopening the debate, in the absence of any compelling reasons for doing so, on the rules of the 1969 and 1986 Vienna Conventions. There were in fact no such reasons, notwithstanding a number of lacunae and ambiguities that could be found in articles 20 and 21 of both those Conventions.

48. The second addendum to the fourteenth report (A/CN.4/614/Add.2) dealt with the effects of established reservations, considering first the conditions under which a reservation could be considered to be established (section 4.1) and focusing subsequently on the legal effects produced by such a reservation (section 4.2). The establishment of a reservation was a necessary condition if a reservation was to produce its effects in accordance with article 21, paragraphs 1 and 2, of the 1969 and 1986 Vienna Conventions. It was thus necessary to clarify in a draft guideline what was meant by an "established" reservation in the sense of the *chapeau* of article 21, paragraph 1, of the two Conventions. Accordingly, draft guideline 4.1[22] stipulated that the establishment of a reservation was normally subject to three conditions: (1) the reservation should be permissible in the sense of article 19 of the 1969 and 1986 Vienna Conventions, the content of which was reproduced in guideline 3.1, provisionally adopted by the Commission; (2) it must meet the conditions for formal validity set out in article 23 of the Vienna Conventions and specified in the second part of the Guide to Practice; and (3) another contracting State or organization must have accepted the reservation. Established reservations were thus valid and accepted reservations, in contrast with reservations that, while possibly valid, had elicited an objection on the part of a contracting State or organization. However, as the *chapeau* of paragraph 4 of article 20 of the 1969 and 1986 Vienna Conventions made clear, the general rule contained in draft guideline 4.1 was subject to certain exceptions.

49. A first exception was set out in article 20, paragraph 1, of the 1969 and 1986 Vienna Conventions, according to which "[a] reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States [...] unless the treaty so provides". Draft guideline 4.1.1[23] was intended to cover that situation. As a reservation

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[22] Draft guideline 4.1 read as follows:

4.1 Establishment of a reservation

A reservation is established with regard to another contracting party if it meets the requirements for permissibility of a reservation and was formulated in accordance with the form and procedures specified for the purpose, and if the other contracting party has accepted it.

[23] Draft guideline 4.1.1 read as follows:

4.1.1 Establishment of a reservation expressly authorized by the treaty

A reservation expressly authorized by the treaty is established with regard to the other contracting parties if it was formulated in accordance with the form and procedure specified for the purpose.

A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States and organizations, unless the treaty so provides.

The term "reservation expressly authorized by the treaty" applies to reservations excluding the application of one or more provisions of the treaty or modifying the legal effect of one or more of its provisions or of the treaty as a whole, pursuant to and to the extent provided by an express provision contained in the treaty.

expressly authorized was by definition permissible and accepted by contracting States and organizations, the first paragraph of the draft guideline set out the sole condition for the establishment of such a reservation, namely that it should have been formulated in accordance with the form and procedures stipulated for that purpose. The second paragraph of the draft guideline reiterated the wording of article 20, paragraph 1, of the 1969 and 1986 Vienna Conventions, while the third paragraph sought to clarify the meaning of the expression "reservation expressly authorized by the treaty", which should be interpreted restrictively. That expression covered reservations that excluded the application of one or more provisions of the treaty, in accordance with an express provision of the latter, and also reservations described as "negotiated", the text of which was included in the text of the treaty itself. Draft guideline 4.1.1 was not, however, intended to cover situations in which a treaty authorized reservations in general or cases in which the treaty authorized reservations to specific provisions without specifying the content of such reservations. In that connection, it must be made quite plain that authorization to formulate reservations was not tantamount to licence to undermine the object and the purpose of the treaty. The commentary should indicate that contracting States or organizations did not have the freedom to object to expressly authorized reservations as understood in draft guideline 4.1.1.

50. The second exception was covered by draft guideline 4.1.2[24] and corresponded to the situation contemplated in article 20, paragraph 2, of the 1969 and 1986 Vienna Conventions. That exception involved treaties with limited participation, the only category to which the traditional system requiring unanimous acceptance of reservations continued to apply. In order to be established, a reservation to that type of treaty required the acceptance of all contracting parties. The first paragraph of draft guideline 4.1.2 set out that condition while also recalling the other conditions for the establishment of a reservation. As indicated in that paragraph, the term "treaty with limited participation" referred to treaties the full application of which by all parties was an essential condition for each party's consent to be bound by the treaty. Currently, such treaties were no longer defined solely by the number of participants but also, and especially, by the intention of the parties to preserve the integrity of the treaty regime. The Special Rapporteur was of the view that the criterion of the object and purpose of the treaty, notwithstanding its pertinence in the abstract, was not of much use in determining the notion of a treaty with limited participation.

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[24] Draft guideline 4.1.2 read as follows:

4.1.2 Establishment of a reservation to a treaty with limited participation

A reservation to a treaty with limited participation is established with regard to the other contracting parties if it meets the requirements for permissibility of a reservation and was formulated in accordance with the form and procedures specified for the purpose, and if all the other contracting parties have accepted it.

The term "treaty with limited participation" means a treaty of which the application in its entirety between the parties is an essential condition of the consent of each one to be bound by the treaty.

51. A third exception, which was covered by draft guideline 4.1.3,[25] concerned reservations to the constituent instrument of an international organization. In accordance with the general principle established in article 20, paragraph 3, of the 1969 and 1986 Vienna Conventions and recalled in guideline 2.8.7, draft guideline 4.1.3 established the requirement that the reservation must be accepted by the competent organ of the organization. The meaning and the consequences of that requirement, the modalities of such an acceptance and the impact of the reaction of a member of the international organization to a reservation formulated by another member to the constituent instrument of the organization were spelled out in draft guidelines 2.8.8 to 2.8.11.

52. Draft guidelines 4.2.1 to 4.2.7 dealt with the effects of a reservation established within the meaning of draft guideline 4.1. The establishment of a reservation produced two categories of effects: first, it constituted the author of the reservation a contracting party to the treaty; secondly, it produced on the content of the treaty relationship the effects purported by the established reservation.

53. As to the first category of effects of an established reservation, they related to the status of the author of the reservation as well as the entry into force of the treaty. While the rule regarding the status of the author of a reservation as contracting party to the treaty was clear, its practical application had been inconsistent: some depositaries of multilateral treaties, such as the Secretary-General of the United Nations, indeed considered that a reserving State had already become a party on the date on which it had expressed its consent to be bound by the treaty, without waiting for an acceptance by one contracting party or for the expiration of the period of 12 months set by article 20, paragraph 5, of the Vienna Conventions. In the view of the Special Rapporteur, that practice, while dominant, did not provide enough justification to deviate from the reservations regime established by the Vienna Conventions. Draft guideline 4.2.1 thus reflected the fundamental principle embodied in article 20, paragraph 4 (c), of the Vienna Conventions.[26]

54. If the treaty had not yet entered into force, the addition of the author of the established reservation to the number of contracting parties could also have a direct consequence for the fulfilment of the conditions for the entry into force of the treaty; that additional effect was specified in draft guideline 4.2.2.[27] It was moreover necessary to state that the author of the reservation became a party to the treaty only with regard to the contracting parties that had accepted the reservation; the purpose of draft guideline 4.2.3

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[25] Draft guideline 4.1.3 read as follows:

4.1.3 Establishment of a reservation to a constituent instrument of an international organization

A reservation to a constituent instrument of an international organization is established with regard to the other contracting parties if it meets the requirements for permissibility of a reservation and was formulated in accordance with the form and procedures specified for the purpose, and if the competent organ of the organization has accepted it in conformity with guidelines 2.8.7 to 2.8.10.

[26] Draft guideline 4.2.1 read as follows:

4.2.1 Status of the author of an established reservation

As soon as the reservation is established, its author is considered a contracting State or contracting organization to the treaty.

[27] Draft guideline 4.2.2 read as follows:

4.2.2 Effect of the establishment of a reservation on the entry into force of a treaty

When a treaty has not yet entered into force, the author of a reservation shall be included in the number of contracting States or contracting organizations required for the treaty to enter into force once the reservation is established.

was precisely to reflect what the Commission had, in the context of its work on the law of treaties, termed a system of "relative"[28] participation in the treaty.[29]

55. Draft guideline 4.2.4 specified the consequences that an established reservation had on the content of treaty relations and, more precisely, the modification it entailed in the legal effects of the provisions to which it related.[30] According to article 2, paragraph 1 (d), of the Vienna Conventions, a reservation might either exclude or modify the legal effects of treaty provisions. Draft guideline 4.2.5 dealt with the case of excluding reservations by which their authors purported to exclude the legal effect of one or more provisions of the treaty;[31] draft guideline 4.2.6 addressed the second category of effects, that of modifying reservations, by which their authors purported to replace the obligation under the treaty with a different one.[32]

56. Once established, reservations had a reciprocal effect, which Waldock had emphasized in explaining that "reservations always work both ways".[33] Draft guideline

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[28] *Yearbook ... 1966*, vol. II, pp. 207–208, para. (22) of the commentary to draft article 17.

[29] Draft guideline 4.2.3 read as follows:

> **4.2.3 Effects of the entry into force of a treaty on the status of the author of an established reservation**
>
> The establishment of a reservation constitutes its author a party to the treaty in relation to contracting States or international organizations in respect of which the reservation is established if or when the treaty is in force.

[30] Draft guideline 4.2.4 read as follows:

> **4.2.4 Content of treaty relations**
>
> A reservation established with regard to another party modifies for the reserving State or international organization in its relations with that other party the legal effects of the provisions of the treaty to which the reservation relates, to the extent of the reservation.

[31] Draft guideline 4.2.5 read as follows:

> **4.2.5 Exclusion of the legal effect of a treaty provision**
>
> A reservation established with regard to another party which purports to exclude the legal effect of a treaty provision renders the treaty provision(s) inapplicable in relations between the author of the reservation and the other party.
>
> The author of the established reservation is not required to comply with the obligation imposed by the treaty provision(s) concerned in treaty relations between it and States and international organizations with regard to which the reservation is established.
>
> The State or international organization with regard to which the reservation is established cannot claim the right contained in the relevant provision in the context of its treaty relations with the author of the reservation.

[32] Draft guideline 4.2.6 read as follows:

> **4.2.6 Modification of the legal effect of a treaty provision**
>
> A reservation established with regard to another party which purports to modify the legal effect of a treaty provision has the effect, in the relations between the author of the reservation and the other party, of substituting the rights and obligations contained in the provision as modified by the reservation for the rights and obligations under the treaty provision which is the subject of the reservation.
>
> The author of an established reservation is required to comply with the obligation under the treaty provision (or provisions) modified by the reservation in the treaty relations between it and the States and international organizations with regard to which the reservation is established.
>
> The State or international organization with regard to which the reservation is established can claim the right under the treaty provision modified by the reservation in the context of its treaty relations with the author of the reservation in question.

[33] "General Course on Public International Law", *Recueil des cours de l'Académie de droit*

4.2.7 was intended to reflect the principle of reciprocal application of the effects of a reservation, firmly deriving from the consensual basis of treaty relations.[34] As applied to reservations, the principle of reciprocity also played a deterrent role, in that it encouraged parties not to resort too broadly to reservations which could then be relied on by other parties. There were, however, important exceptions to the principle of reciprocity in that context, stemming either from the content of the reservation itself or from the content or nature of the treaty. Subparagraph (a) of draft guideline 4.2.7 dealt with the first of those exceptions, constituted for instance by a reservation purporting to limit the territorial application of a treaty. Subparagraph (b) specifically addressed the case of obligations, such as those in human rights treaties, which did not lend themselves to a reciprocal application. Subparagraph (c) covered, more broadly, cases such as reservations to treaties providing uniform law, in which the principle of reciprocal application was paralysed by the object and purpose of the treaty or the nature of the obligation.

57. In introducing his fifteenth report (A/CN.4/624 and Add.1 and 2), the Special Rapporteur emphasized that it must be viewed as the mere continuation of the fourteenth report, and more specifically of the section devoted to the effects of reservations, acceptances and objections. As presented in the fifteenth report, draft guidelines 4.3 to 4.3.9 and 4.4.1 to 4.4.3 respectively dealt with the effects of an objection to a valid reservation and the effect of a valid reservation on extraconventional norms.

58. States attached great importance to the central question of the effects of an objection to a valid reservation, which was cautiously and somewhat ambiguously addressed in the Vienna Conventions. For a party to be bound against its will by the modifications brought by a reservation of another party to the treaty would obviously run contrary to the principle of consent; as was conveyed by draft guideline 4.3,[35] the effect of an objection was precisely to make the reservation inapplicable as against the author of the objection, to the extent that the reservation was not established within the meaning of draft guideline 4.1. That was not, however, the only consequence of an objection, which could also have an effect both on the entry into force of the treaty and on the content of treaty relations between the author of the reservation and the author of the objection.

59. As to the entry into force of the treaty, the Special Rapporteur expressed some doubts as to the decision made during the Vienna Conference to reverse the traditional presumption that an objection to a reservation precluded the entry into force as between the

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international de La Haye (RCADI), vol. 106, 1962-II, p. 87.

[34] Draft guideline 4.2.7 read as follows:

4.2.7 Reciprocal application of the effects of an established reservation

A reservation modifies the content of treaty relations for the State or international organization with regard to which the reservation is established in their relations with the author of the reservation to the same extent as for the author, unless:

(a) Reciprocal application of the reservation is not possible because of the nature or content of the reservation;

(b) The treaty obligation to which the reservation relates is not owed individually to the author of the reservation; or

(c) The object and purpose of the treaty or the nature of the obligation to which the reservation relates exclude any reciprocal application of the reservation.

[35] Draft guideline 4.3 read as follows:

4.3 Effect of an objection to a valid reservation

The formulation of an objection to a valid reservation renders the reservation inapplicable as against the objecting State or international organization unless the reservation has been established with regard to that State or international organization.

objecting and the reserving States. Draft guidelines 4.3.1 to 4.3.4 nevertheless reflected the system eventually adopted in the Vienna Conventions. Draft guideline 4.3.1 emphasized the neutral effect that a simple objection had on the entry into force of the treaty: while it did not preclude such entry into force, an objection did not *ipso facto* result in it, contrary to the effect attached to the acceptance of a reservation.[36] Given the neutral effect of an objection in that regard, it was necessary to spell out the conditions in which a treaty entered into force between the author of a reservation and the author of the objection; such was the purpose of draft guideline 4.3.2.[37]

60. The principle embodied in draft guideline 4.3.2 was subject to two exceptions. The first one related to the effect that an objection would have on the entry into force of a treaty when unanimous acceptance of the reservation was required; it was spelled out in draft guideline 4.3.3.[38] The second exception concerned cases of objections with maximum effect, by which their authors specifically purported not to apply the treaty as with the author of the reservation; that exception was reflected in draft guideline 4.3.4.[39]

61. Draft guidelines 4.3.5 to 4.3.9 dealt with the content of treaty relations between the author of the reservation and the author of an objection. Three different categories could be identified in that respect. In the first one, the objection had only a minimum effect on treaty relations, in that it led to the partial non-application of the treaty. The text of article 21, paragraph 3, of the 1986 Vienna Convention, which reflected that simple effect of an objection, was reproduced in draft guideline 4.3.5[40] with a minor addition, which sought to

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[36] Draft guideline 4.3.1 read as follows:

4.3.1 Effect of an objection on the entry into force of the treaty as between the author of the objection and the author of the reservation

An objection by a contracting State or by a contracting organization to a valid reservation does not preclude the entry into force of the treaty as between the objecting State or international organization and the reserving State or organization, except in the case mentioned in guideline 4.3.4.

[37] Draft guideline 4.3.2 read as follows:

4.3.2 Entry into force of the treaty as between the author of the reservation and the author of the objection

The treaty enters into force as between the author of the reservation and the objecting contracting State or contracting organization as soon as the treaty has entered into force and the author of the reservation has become a contracting party in accordance with guideline 4.2.1.

[38] Draft guideline 4.3.3 read as follows:

4.3.3 Non-entry into force of the treaty for the author of the reservation when unanimous acceptance is required

If unanimous acceptance is required for the establishment of the reservation, any objection by a contracting State or by a contracting organization to a valid reservation precludes the entry into force of the treaty for the reserving State or organization.

[39] Draft guideline 4.3.4 read as follows:

4.3.4 Non-entry into force of the treaty as between the author of the reservation and the author of an objection with maximum effect

An objection by a contracting State or by a contracting international organization to a valid reservation does not preclude the entry into force of the treaty as between the objecting State or international organization and the reserving State or organization, unless a contrary intention has been definitely expressed by the objecting State or organization [in accordance with guideline 2.6.8].

[40] Draft guideline 4.3.5 read as follows:

4.3.5 Content of treaty relations

When a State or an international organization objecting to a valid reservation has not convey that an objection could only affect the part of the provision to which the reservation related, as pointed out by the Court of Arbitration in the *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*.[41] In order to clarify further the effect of such an objection, draft guidelines 4.3.6 and 4.3.7 built upon the distinction established in article 2, paragraph 1 (d), of the Vienna Conventions between excluding and modifying reservations. Draft guideline 4.3.6[42] addressed the case in which a reservation purported to exclude the legal effect of some treaty provisions: in such a situation, an objection to the reservation actually had the same effect as an acceptance thereof. In contrast, when an objection was made to a reservation having a modifying effect, neither the provision to which the reservation related nor the obligation as it would be affected by the reservation could apply; draft guideline 4.3.7[43] reflected the specific bilateral relationship thus created.

62. A second category of treaty relations between the author of the reservation and the author of an objection had developed in practice, on the basis of objections which purported to exclude the application of treaty provisions that were not specifically affected by the reservation. The intermediate effect of such objections was to be admitted, with due consideration for the principle of mutual consent, and as long as provisions that were essential for the realization of the object and purpose of the treaty were not thereby affected. Draft guideline 4.3.8,[44] as subsequently revised by the Special Rapporteur by the

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opposed the entry into force of the treaty as between itself and the reserving State or organization, the provisions or parts of provisions to which the reservation relates do not apply as between the author of the reservation and the objecting State or organization, to the extent of the reservation.

[41] (*Mer d'Iroise* case) decision of 30 June 1977, Reports of International Arbitral Awards, vol. XVIII, p. 3, at p. 42, para. 61.

[42] Draft guideline 4.3.6 read as follows:

4.3.6 Content of treaty relations in the case of a reservation purporting to exclude the legal effect of one or more provisions of the treaty

A contracting State or a contracting organization that has formulated a valid reservation purporting to exclude the legal effect of one or more provisions of the treaty and a contracting State or a contracting organization that has raised an objection to it but has not opposed the entry into force of the treaty as between itself and the author of the reservation are not bound, in their treaty relations, by the provisions to which the reservation relates to the extent that they would not be applicable as between them if the reservation were established.

All other treaty provisions that would be applicable if the reservation were established remain applicable as between the two parties.

[43] Draft guideline 4.3.7 read as follows:

4.3.7 Content of treaty relations in the case of a reservation purporting to modify the legal effect of one or more provisions of the treaty

A contracting State or a contracting organization that has formulated a valid reservation purporting to modify the legal effect of one or more provisions of the treaty and a contracting State or a contracting organization that has raised an objection to it but has not opposed the entry into force of the treaty as between itself and the author of the reservation are not bound, in their treaty relations, by the provisions to which the reservation relates to the extent that they would be modified as between them if the reservation were established.

All other treaty provisions that would be applicable if the reservation were established remain applicable as between the two parties.

[44] Draft guideline 4.3.8 read as follows:

4.3.8 Non-application of provisions other than those to which the reservation relates

In the case where a contracting State or a contracting organization which has raised an objection to a valid reservation has expressed the intention, any provision of the treaty to which the reservation does not refer directly but which has a sufficiently close link with the provision or addition of a second paragraph, dealt with the intermediate effect which an objection could have, within the limits thus set forth.

63. A much more controversial category was constituted by objections purporting to have a "super-maximum" effect. Authors of such objections, considering that the reservation was incompatible with the object and purpose of the treaty, maintained that their treaty relations with the author of the reservation remained unaffected by that reservation. Such an objection was clearly incompatible with the principle of mutual consent, as pointed out in draft guideline 4.3.9.[45]

64. Draft guidelines 4.4.1 to 4.4.3 dealt with the less controversial issue of the effect of a valid reservation on extraconventional obligations. A State could not use a reservation to a particular treaty to evade its obligations under another treaty or under general international law; draft guideline 4.4.1[46] thus emphasized the absence of effect of a reservation, or acceptance of or objection to it, on treaty obligations under another treaty, while draft guideline 4.4.2,[47] formerly included in paragraph 2 of draft guideline 3.1.8,[48] made it clear that a State could not evade the application of a customary norm by formulating a reservation to a treaty provision enunciating that norm. There was, *a fortiori*, no reason not to apply an equivalent rule in respect of reservations to treaty provisions enunciating a peremptory norm of general international law (*jus cogens*); such was the purpose of draft guideline 4.4.3,[49] drafted in a manner similar to that of the previous guideline.

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provisions to which the reservation refers is not applicable in treaty relations between the author of the reservation and the author of the objection, provided the non-application of this provision does not undermine the object and purpose of the treaty.

The treaty shall apply between the author of the reservation and the author of the objection to the extent of the reservation and the objection, unless the reserving State or international organization has opposed, by the end of a period of twelve months [one year] following the notification of the objection, the entry into force of the treaty between itself and the objecting State or international organization.

[45] Draft guideline 4.3.9 read as follows:

4.3.9 Right of the author of a valid reservation not to be bound by the treaty without the benefit of its reservation

The author of a reservation which meets the conditions for permissibility and which has been formulated in accordance with the relevant form and procedure can in no case be bound to comply with all the provisions of the treaty without the benefit of its reservation.

[46] Draft guideline 4.4.1 read as follows:

4.4.1 Absence of effect on the application of provisions of another treaty

A reservation, acceptance of it or objection to it neither modifies nor excludes the respective rights and obligations of their authors under another treaty to which they are parties.

[47] Draft guideline 4.4.2 read as follows:

4.4.2 Absence of effect of a reservation on the application of customary norms

A reservation to a treaty provision which reflects a customary norm does not affect the binding nature of the customary norm, which shall continue to apply as between the reserving State or international organization and other States or international organizations which are bound by that norm.

[48] See *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), p. 88.

[49] Draft guideline 4.4.3 read as follows:

4.4.3 Absence of effect of a reservation on the application of peremptory norms of general international law (*jus cogens*)

A reservation to a treaty provision which reflects a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of the norm in question, which

65. Addendum 1 to the fifteenth report (A/CN.4/624/Add.1), which supplemented the study of the effects of reservations, concerned the effects of invalid reservations – in other words, reservations that did not meet the conditions relating to form and substance set out in articles 19 and 23 of the Vienna Conventions and clarified in Parts 2 and 3 of the Guide to Practice. The question of the effects of invalid reservations, which had not been resolved in the Vienna Conventions, had likewise not been addressed in the draft articles on the law of treaties prepared by the Commission. However, the Special Rapporteur was of the view that the Commission had a duty to identify general principles in the matter, drawing on the overall logic of the Vienna Conventions, their *travaux préparatoires* and relevant elements of practice – in full knowledge that the Commission would inevitably be called upon to contribute to the progressive development of international law.

66. Draft guideline 4.5.1,[50] which was to open section 4.5 of the Guide to Practice devoted to the effects of an invalid reservation, affirmed that reservations that did not fulfil the conditions for formal validity and permissibility set out in Parts 2 and 3 of the Guide to Practice were null and void. In the view of the Special Rapporteur, that statement was consistent not only with the logic of the Vienna Conventions and the few references to the question in the *travaux préparatoires* but also with the practice, which was more extensive on the subject than it first appeared. Draft guideline 4.5.2[51] then posited an obvious consequence of the nullity of an invalid reservation – a consequence that was linked by definition to the concept of nullity, namely that such a reservation was devoid of legal effects. According to the Special Rapporteur, that solution was upheld by the broad majority of views expressed in the Commission, the Sixth Committee and human rights bodies; it was also supported by the practice of States and international organizations.

67. The consequences of the nullity of an invalid reservation gave rise to two conflicting theses, the first being the thesis of severability, according to which the author of an invalid reservation was bound by the treaty without the benefit of its reservation, and the second being the thesis of "pure consensualism", according to which the invalidity of the reservation excluded the author from the circle of States parties, the reservation being a *sine qua non* for the author's consent to be bound by the treaty. As there were logical justifications for both approaches, and as practice in the matter was ambivalent, the Commission was compelled to engage in progressive development. After giving the matter thorough consideration, the Special Rapporteur presented the Commission with a solution in draft guideline 4.5.3[52] that constituted a happy medium ("*juste milieu*") and which he

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shall continue to apply as such between the reserving State or international organization and other States or international organizations which are bound by that norm.

[50] Draft guideline 4.5.1 read as follows:

4.5.1 Nullity of an invalid reservation

A reservation that does not meet the conditions of permissibility and validity set out in parts II and III of the Guide to Practice is null and void.

[51] Draft guideline 4.5.2 read as follows:

4.5.2 Absence of legal effect of an invalid reservation

A reservation that is null and void pursuant to draft guideline 4.5.1 is devoid of legal effects.

[52] Draft guideline 4.5.3 read as follows:

4.5.3 [Application of the treaty in the case of an invalid reservation] [Effects of the nullity of a reservation on consent to be bound by the treaty]

When an invalid reservation has been formulated in respect of one or more provisions of a treaty, or of certain specific aspects of the treaty as a whole, the treaty applies to the reserving State or to the reserving international organization, notwithstanding the reservation, unless a contrary intention of the said State or organization is established.

considered reasonable. The solution involved stating a presumption of the severability of the invalid reservation, a presumption that would be set aside if the author of the reservation expressed a contrary intention – i.e., the intention not to become a party to the treaty if its reservation was deemed invalid. The second paragraph of draft guideline 4.5.3 contained a list, albeit not an exhaustive one, of the various criteria that could be useful in determining the intention of the author of the reservation with regard to the severability of the reservation. However, if the author's intention could not be convincingly determined on the basis of those criteria, the presumption of severability of an invalid reservation as set out in the first paragraph of the draft guideline would apply. According to the Special Rapporteur, such a presumption was likely to promote the reservations dialogue. Moreover, the opposite presumption would pose serious problems of legal stability and retroactively create a legal void between the time of expression of consent to be bound by the treaty and the time of determination of the nullity of the reservation in question. The Special Rapporteur noted also that support for the idea that the severability of an invalid reservation was merely a presumption could be found in the positions expressed recently in some human rights bodies.

68. Draft guideline 4.5.4[53] set out a logical and inescapable consequence of the very principle of the nullity of invalid reservations, namely that the fact that such reservations were devoid of any effect did not depend on the reactions of other States or international organizations. That being said, paragraph 2 of the draft guideline recommended that a State or international organization that considered a reservation to be invalid should formulate a reasoned objection to that effect as soon as possible. The Special Rapporteur was of the view that the formulation of a reasoned objection was in the interest of both the author of the reservation and the author of the objection; furthermore, such an objection, like the other reactions elicited by the reservation in question, might constitute an element that could be used in certain cases by third parties called upon to rule on the validity of the reservation.

69. Draft guidelines 3.3.3 and 3.3.4, concerning the problem of the acceptance of an invalid reservation, had already been proposed by the Special Rapporteur in his tenth report (A/CN.4/458/Add.2). The Special Rapporteur continued to think that those draft guidelines had a place in Part 3 of the Guide to Practice, which dealt with the permissibility of reservations, and not in Part 4, concerning effects, given that they answered — albeit in the

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The intention of the author of the reservation must be established by taking into consideration all the available information, including, inter alia:

- The wording of the reservation
- The provision or provisions to which the reservation relates and the object and purpose of the treaty
- The declarations made by the author of the reservation when negotiating, signing or ratifying the treaty
- The reactions of other contracting States and contracting organizations
- The subsequent attitude of the author of the reservation

[53] Draft guideline 4.5.4 read as follows:

4.5.4 Reactions to an invalid reservation

The effects of the nullity of an invalid reservation do not depend on the reaction of a contracting State or of a contracting international organization.

A State or international organization which, having examined the validity of a reservation in accordance with the present Guide to Practice, considers that the reservation is invalid, should nonetheless formulate a reasoned objection to that effect as soon as possible.

negative except in cases of unanimous acceptance — the question that arose earlier as to whether or not an acceptance could "validate" an impermissible reservation.

70. Draft guideline 3.3.3[54] set out the principle according to which acceptance of an invalid reservation by a contracting State or organization did not change the nullity of the reservation. Acceptance of such a reservation could not give rise to a collateral agreement between the reserving State and the objecting State that modified the treaty relations between the two: in fact, article 41 (b) (ii) of the Vienna Conventions excluded any partial agreement that was incompatible "with the effective execution *of the object and purpose of the treaty* as a whole", which in theory would be the case if the agreement concerned an impermissible reservation (although it would obviously not be the case if only formal invalidity was involved).

71. One could also imagine a situation — one that was conceivable in the case of a treaty with limited participation — in which all the contracting States, having been consulted by the depositary, expressed their acceptance of the reservation in question. That case, contemplated by draft guideline 3.3.4,[55] would correspond to an agreement between all the parties within the meaning of article 39 of the Vienna Conventions – an agreement whose existence could not, however, lightly be presumed.

72. Draft guideline 4.6,[56] for which two alternative texts had been proposed, concerned the absence of effect of a reservation on the treaty relations between the parties to a treaty

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[54] Draft guideline 3.3.3 read as follows:

3.3.3 Effect of unilateral acceptance of an invalid reservation

Acceptance of a reservation by a contracting State or by a contracting international organization shall not change the nullity of the reservation.

[55] Draft guideline 3.3.4 read as follows:

3.3.4 Effect of collective acceptance of an invalid reservation

A reservation that is explicitly or implicitly prohibited by the treaty or which is incompatible with its object and purpose may be formulated by a State or an international organization if none of the other contracting States or contracting organizations [1] objects to it after having been expressly consulted by the depositary.

[1 During such consultation, the depositary shall draw the attention of the signatory States and international organizations and of the contracting States and international organizations and, where appropriate, the competent organ of the international organization concerned, to the nature of legal problems raised by the reservation.

The draft guideline initially proposed by the Special Rapporteur used the expression "contracting parties", which is in common use and which, in his view, included contracting States and contracting organizations. Following various comments made within the Commission, the Special Rapporteur reconsidered this convenient term, which he acknowledged to be incompatible with the definitions of "contracting State" and "contracting organization", on the one hand, and "party", on the other, contained in article 2, paragraph 1 (f) (i) and (ii), and paragraph 1 (g), respectively, of the 1986 Vienna Convention.]

[56] Draft guideline 4.6 read as follows:

4.6 Absence of effect of a reservation on relations between contracting States and contracting organizations other than its author

Option 1:

A reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

Option 2:

[Without prejudice to any agreement between the parties as to its application,] a reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

other than the author of the reservation. The first version simply reproduced the text of article 21, paragraph 1, of the Vienna Conventions, while the second explicitly contemplated the case, admittedly rare, of an agreement among all the parties to adapt the application of the treaty to the reservation.

73. Addendum 2 to the fifteenth report (A/CN.4/624/Add.2) concerned the effects of interpretative declarations and of reactions to such declarations. Notwithstanding the silence of the Vienna Conventions on interpretative declarations, the rules of interpretation contained in articles 31 and 32 of the Conventions provided many useful indications of how the effects of interpretative declarations might be approached.

74. While it was true that interpretative declarations did not have a binding effect on other contracting States or bodies tasked with settling disputes among the parties with regard to the interpretation or application of the treaty, and that such declarations could not modify the treaty, the fact remained that such declarations could have some value for interpretation; such was the thrust of draft guideline 4.7.[57]

75. To the Special Rapporteur, even though it seemed difficult to make interpretative declarations by themselves part of the "context" of the treaty mentioned in article 31, paragraph 1, of the Vienna Conventions, such declarations could nevertheless help to elucidate the meaning to be given to a treaty and confirm an interpretation reached through application of the general rule of interpretation set out in article 31. That was the sense of draft guideline 4.7.1,[58] which made reference also to approvals and objections that the declaration might have elicited from other contracting States or organizations.

76. Furthermore, as the formulation of an interpretative declaration could create expectations on the part of the other contracting States or organizations, draft guideline 4.7.2[59] set out the principle according to which the author of an interpretative declaration could not invoke an interpretation contrary to that put forward in its declaration. In the view of the Special Rapporteur, the same principle should apply to a State or an international organization that had approved the declaration in question.

77. The problem arose differently, however, in the case covered by draft guideline 4.7.3,[60] in which the approval of an interpretative declaration was unanimous, thus

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[57] Draft guideline 4.7 read as follows:

4.7 Effects of an interpretative declaration

An interpretative declaration may not modify treaty obligations. It may only specify or clarify the meaning or scope which its author attributes to a treaty or to some of its provisions and, accordingly, may constitute an element to be taken into account as an aid to interpreting the treaty.

[58] Draft guideline 4.7.1 read as follows:

4.7.1 Clarification of the terms of the treaty by an interpretative declaration

An interpretative declaration may serve to elucidate the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose in accordance with the general rule of interpretation of treaties.

In determining how much weight should be given to an interpretative declaration in the interpretation of the treaty, approval of and opposition to it by the other contracting States and contracting organization shall be duly taken into account.

[59] Draft guideline 4.7.2 read as follows:

4.7.2 Validity of an interpretative declaration in respect of its author

The author of an interpretative declaration or a State or international organization having approved it may not invoke an interpretation contrary to that put forward in the declaration.

[60] Draft guideline 4.7.3 read as follows:

constituting an agreement regarding the interpretation of the treaty that, depending upon the circumstances, was covered by article 31, paragraph 2 or paragraph 3 (a), of the Vienna Conventions.

78. Lastly, draft guideline 4.7.4[61] contemplated, for the record, the case of conditional interpretative declarations. However, as the consideration of the topic had shown that such declarations behaved in all respects like reservations, the Special Rapporteur was of the view that the draft guideline could be omitted from the Guide to Practice. For, as it had been previously agreed for the case in which no specificities could be identified concerning the rules applicable to interpretative declarations, it would suffice to include in the Guide to Practice a general provision placing conditional interpretative declarations under the legal regime of reservations.

2. Introduction by the Special Rapporteur of his sixteenth report

79. The sixteenth report (A/CN.4/626 and Add.1), which drew most of its content from a memorandum by the Secretariat (A/CN.4/616), addressed the question of reservations, acceptances of reservations, objections to reservations and interpretative declarations in the context of succession of States. According to the overall plan of the Guide to Practice proposed by the Special Rapporteur in his second report,[62] those questions would form the subject of the fifth and final part of the Guide.

80. The basic hypothesis of the draft guidelines contained in the fifth part was that a successor State had the status of a contracting State or State party to a treaty following a succession of States, and not by virtue of an expression of its consent to be bound by the treaty in the sense of article 11 of the 1969 and 1986 Vienna Conventions. Notwithstanding the limited number of ratifications of the Vienna Convention on Succession of States in respect of Treaties of 23 August 1978,[63] the proposed draft guidelines were not intended to reopen the debate on the few relevant rules and principles set out in that Convention or the definitions contained in it, including the definition of the term "succession of States", which was widely accepted.

81. The only universal conventional norms relating to reservations in the context of succession of States were contained in article 20 of the 1978 Vienna Convention. However, that provision was concerned solely with newly independent States – in other words, to use the terminology of that Convention, States created by the decolonization process. Furthermore, article 20 contained a number of lacunae, particularly with regard to the question of objections to and acceptances of reservations. Nevertheless, the Special Rapporteur was of the view that that provision should constitute the starting point for the fifth part of the Guide to Practice.

82. Like article 20 of the 1978 Vienna Convention, the draft guidelines in the fifth part of the Guide to Practice applied only to reservations that could be formulated by a

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4.7.3 Effects of an interpretative declaration approved by all the contracting States and contracting organizations

An interpretative declaration that has been approved by all the contracting States and contracting organizations constitutes an agreement regarding the interpretation of the treaty.

[61] Draft guideline 4.7.4 read as follows:

4.7.4 Effects of a conditional interpretative declaration

A conditional interpretative declaration produces the same effects as a reservation in conformity with guidelines 4.1 to 4.6.

[62] *Yearbook ... 1996*, vol. II, Part One, A/CN.4/477, pp. 48 and 49, para. 37.

[63] Entered into force on 6 November 1996. United Nations, *Treaty Series*, vol. 1946, p. 3.

predecessor State which, on the date of the succession of States, had been a contracting State or State party to the treaty in question. They did not deal with reservations formulated by a predecessor State that, on the date of succession, had merely signed the treaty subject to eventual ratification, acceptance or approval, without any of those acts having taken place prior to the date of the succession. In fact, the latter type of reservation could hardly be considered to have been maintained by the successor State, since on the date of succession they produced no legal effect, not having been formally confirmed by the State in question at the time of expression of consent to be bound by the treaty, as required under article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions.

83. Draft guideline 5.1[64] concerned newly independent States. It reproduced the solutions identified in article 20 of the 1978 Vienna Convention: the rebuttable presumption that a newly independent State maintained the reservations formulated by the predecessor State (para. 1) and the capacity of the newly independent State to formulate, when notifying its succession to the treaty, reservations (para. 2) provided that it complied with the procedural rules set out in the second part of the Guide to Practice (para. 3). The Special Rapporteur was convinced that those solutions, which the Commission itself had proposed in draft article 19 (which subsequently became, following some minor drafting changes, article 20 of the 1978 Convention) and which were justified chiefly for pragmatic reasons, were well founded.

84. Draft guideline 5.2,[65] which was intended to rectify a lacuna in the 1978 Vienna Convention, concerned successor States that resulted from the unification or separation of

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[64] Draft guideline 5.1 read as follows:

5.1 Newly independent States

1. When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession, it shall be considered as maintaining any reservation to that treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates unless, when making the notification of succession, it expresses a contrary intention or formulates a reservation which relates to the same subject matter as that reservation.

2. When making a notification of succession establishing its status as a party or as a contracting State to a multilateral treaty, a newly independent State may formulate a reservation unless the reservation is one the formulation of which is excluded by the provisions of subparagraph (a), (b) or (c) of guideline 3.1 of the Guide to Practice.

3. When a newly independent State formulates a reservation in conformity with paragraph 2, the relevant rules set out in the second part (Procedure) of the Guide to Practice apply in respect of that reservation.

[65] Draft guideline 5.2 read as follows:

5.2 Uniting or separation of States

1. Subject to the provisions of guideline 5.3, a successor State formed from a uniting or separation of States shall be considered as maintaining any reservation to a treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates unless it expresses a contrary intention at the time of the succession or formulates a reservation which relates to the same subject matter as that reservation.

2. A successor State may not formulate a new reservation at the time of a uniting or separation of States unless it makes a notification whereby it establishes its status as a party or as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but to which the predecessor State was a contracting State.

3. When a successor State formulates a reservation in conformity with paragraph 2, the relevant rules set out in the second part (Procedure) of the Guide to Practice apply in respect of that reservation.

States. The presumption, which was rebuttable, that reservations formulated by the predecessor State were maintained applied *a fortiori* to that type of successor States (para. 1), taking into account the *ipso jure* nature of their succession to treaties in force in respect of the predecessor State on the date of the succession; moreover, that solution seemed to be supported by prevailing practice. On the other hand, the *ipso jure* character of the succession by States created from a uniting or separation of States to treaties that had been in force in respect of the predecessor State on the date of the State succession denied those successor States the possibility of freeing themselves from their obligations under those treaties or reducing them by formulating reservations. Consequently, paragraph 2 limited the ability of States to formulate reservations in situations in which the succession occurred not *ipso jure* but pursuant to a notification by the State created by the uniting or separation of States. Such was the case with treaties that had not been in force for the predecessor State on the date of succession but to which the predecessor State had been a contracting State. As in paragraph 3 of draft guideline 5.1, paragraph 3 of draft guideline 5.2 referred to the procedural rules set out in the second part of the Guide to Practice regarding the formulation of a reservation.

85. In cases involving the unification of States, an exception to the presumption in favour of the maintenance of reservations as established in draft guideline 5.2 nevertheless was needed to address cases in which on the date of the succession one of the predecessor States was a party to the treaty while another was a contracting State but not a party to the treaty. Since in such cases the unified State became a party to the treaty as the successor to the predecessor State that had itself been a party, there was no reason to maintain the reservations formulated by the predecessor contracting State for which the treaty had not been in force on the date of the succession of States. That was the sense of draft guideline 5.3.[66]

86. Draft guideline 5.4[67] set out in general terms the principle, ostensibly self-evident, that a reservation that was considered to be maintained by a successor State had the same territorial scope that it had had prior to the succession of States, subject to draft guideline 5.5.

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[66] Draft guideline 5.3 read as follows:

> **5.3 Irrelevance of certain reservations in cases involving a uniting of States**
>
> When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of any of them continues in force in respect of the State so formed, such reservations as may have been formulated by any such State which, at the date of the succession of States, was a contracting State in respect of which the treaty was not in force shall not be maintained.

[67] Draft guideline 5.4 read as follows:

> **5.4 Maintenance of the territorial scope of reservations formulated by the predecessor State**
>
> A reservation considered as being maintained in conformity with guideline 5.1, paragraph 1, or guideline 5.2, paragraph 1, shall retain the territorial scope that it had at the date of the succession of States, subject to the provisions of guideline 5.5.

87. Draft guideline 5.5[68] set out possible exceptions to the principle in favour of the maintenance of the territorial scope of reservations in cases where, following a unification of States, the territorial scope of the treaty itself was extended to a part of the territory of the unified State to which the treaty had not been applicable prior to the date of the succession. The draft guideline proposed two different hypotheses. The first, contemplated in paragraph 1, was that of a treaty that, on the date of the succession of States, had been in force for only one of the predecessor States: in such cases it should be presumed that any possible extension of the territorial application of the treaty also concerned any reservations to the treaty that might have been formulated by the predecessor State unless the successor State expressed a contrary intention at the time of such extension (subpara. (a)) or the reservation had only limited territorial scope owing to its nature or purpose (subpara. (b)). The second hypothesis, contemplated in paragraph 2, involved a situation in which the treaty was in force for two or more predecessor States on the date of the succession: in such cases, owing to the risk that two or more reservation regimes might conflict or be incompatible, it should be presumed that no reservation extended to the territory concerned by the territorial extension of the treaty unless an identical reservation had been formulated by the predecessor States for which the treaty had been in force (subpara. (a)) or the successor State had either expressly (subpara. (b)) or implicitly (subpara. (c)) indicated a different intention. In any case, as indicated in paragraph 3, the extension of the territorial scope of a reservation would be without effect if it gave rise to the application of contradictory reservations within the same territory. Lastly, paragraph 4 indicated that the

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[68] Draft guideline 5.5 read as follows:

5.5 Territorial scope of reservations in cases involving a uniting of States

1. When, as a result of the uniting of two or more States, a treaty in force at the date of the succession of States in respect of only one of the States forming the successor State becomes applicable to a part of the territory of that State to which it did not apply previously, any reservation considered as being maintained by the successor State shall apply to that territory unless:

(a) The successor State expresses a contrary intention at the time of the extension of the territorial scope of the treaty; or

(b) The nature or purpose of the reservation is such that the reservation cannot be extended beyond the territory to which it was applicable at the date of the succession of States.

2. When, as a result of a uniting of two or more States, a treaty in force at the date of the succession of States in respect of two or more of the uniting States becomes applicable to a part of the territory of the successor State to which it did not apply at the date of the succession of States, no reservation shall extend to that territory unless:

(a) An identical reservation has been formulated by each of those States in respect of which the treaty was in force at the date of the succession of States;

(b) The successor State expresses a different intention at the time of the extension of the territorial scope of the treaty; or

(c) A contrary intention otherwise becomes apparent from the circumstances surrounding that State's succession to the treaty.

3. A notification purporting to extend the territorial scope of reservations within the meaning of paragraph 2 (b) shall be without effect if such an extension would give rise to the application of contradictory reservations to the same territory.

4. The provisions of the foregoing paragraphs shall apply *mutatis mutandis* to reservations considered as being maintained by a successor State that is a contracting State, as a result of a uniting of States, to a treaty which was not in force for any of the uniting States at the date of the succession of States but to which one or more of those States were contracting States at that date, when the treaty becomes applicable to a part of the territory of the successor State to which it did not apply at the date of the succession of States.

same solutions could be applied to reservations that had been formulated in respect of a treaty that, on the date of the succession of States, had not been in force for any of the predecessor States but to which one or, depending on the case, two or more of the predecessor States were contracting States.

88. Draft guideline 5.6[69] dealt with the territorial application of reservations by the successor State in cases of succession that concerned part of the territory, in the sense of article 15 of the 1978 Vienna Convention. The draft guideline established the principle whereby any reservation formulated by a successor State in respect of a treaty whose application extended to the territory concerned by the succession of States applied equally to that territory, unless the successor State expressed a contrary intention (subpara. (a)) — a case that could be likened to a partial withdrawal of the reservation — or it was apparent from the reservation that its application was limited to the territory of the successor State that was within its borders prior to the date of the succession of States, or to a specific territory (subpara. (b)). The draft guideline was worded so as to cover treaties in force for the successor State on the date of the succession of States — the only treaties specifically covered in article 15 — as well as treaties to which the successor State was only a contracting State.

89. With regard to the timing of the effects of non-maintenance by a successor State of a reservation formulated by the predecessor State, it would seem logical to apply by analogy the solution provided for in article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions and reproduced in guideline 2.5.8, concerning withdrawal of a reservation. Thus under the terms of draft guideline 5.7[70] the non-maintenance of a reservation became operative in relation to another contracting State or organization or another State or organization party to the treaty when that State or organization received notification thereof.

90. Draft guideline 5.8,[71] which dealt with the timing of the effects of a reservation formulated by a successor State, sought to fill a gap in the 1978 Vienna Convention. In the

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[69] Draft guideline 5.6 read as follows:

> **5.6 Territorial scope of reservations of the successor State in cases of succession involving part of a territory**
>
> When, as a result of a succession of States involving part of a territory, a treaty to which the successor State is a party or a contracting State becomes applicable to that territory, any reservations to the treaty formulated previously by that State shall also apply to that territory as from the date of the succession of States unless:
>
> (a) The successor State expresses a contrary intention; or
>
> (b) It appears from the reservation that its scope was limited to the territory of the successor State that was within its borders prior to the date of the succession of States, or to a specific territory.

[70] Draft guideline 5.7 read as follows:

> **5.7 Timing of the effects of non-maintenance by a successor State of a reservation formulated by the predecessor State**
>
> The non-maintenance[, in conformity with guideline 5.1 or 5.2,] by the successor State of a reservation formulated by the predecessor State becomes operative in relation to another contracting State or contracting international organization or another State or international organization party to the treaty when notice of it has been received by that State or international organization.

[71] Draft guideline 5.8 read as follows:

> **5.8 Timing of the effects of a reservation formulated by a successor State**

interest of legal security, it was important to uphold the principle whereby a reservation could not produce an effect any sooner than the date on which it was formulated – in the case at hand, on the date on which the successor State notified its status as a contracting State or State party to the treaty.

91. Draft guideline 5.9[72] set out the situations in which a reservation formulated by a successor State was subject to the legal regime of late reservations. In the context of a voluntary succession to a treaty that occurred by means of a notification, this was the case concerning reservations formulated after such notification, either by a newly independent State (subpara. (a)) or by a successor State other than a newly independent State with regard to a treaty that on the date of the succession had not been in force for the predecessor State but to which the predecessor State was a contracting State (subpara. (b)). Moreover, following the logic of draft guideline 5.2, any reservation formulated by a successor State other than a newly independent State in respect of a treaty that remained in force for that State following a succession of States must be considered as late (subpara. (c)).

92. Given the silence of the 1978 Vienna Convention and the scarcity of State practice in the matter, draft guidelines 5.10 to 5.16 on objections in the context of succession of States were surely a matter of the progressive development, or even "logical development", of international law. Draft guidelines 5.10 and 5.11 addressed the question of what became of objections formulated by the predecessor State. In the view of the Special Rapporteur, the rebuttable presumption in favour of maintenance, set out in paragraph 1 of draft guidelines 5.1 and 5.2, could be logically transposed to objections and applied to all successor States. Such was the solution enunciated in draft guideline 5.10.[73] With regard to the successor State's capacity to express a contrary intention, it might be judicious to delete the words "at the time of the succession", given that an objection could be withdrawn at any time.

A reservation formulated by a successor State[, in conformity with guideline 5.1 or 5.2,] when notifying its status as a party or as a contracting State to a treaty becomes operative as from the date of such notification.

[72] Draft guideline 5.9 read as follows:

5.9 Reservations formulated by a successor State subject to the legal regime for late reservations

A reservation shall be considered as late if it is formulated:

(a) By a newly independent State after it has made a notification of succession to the treaty;

(b) By a successor State other than a newly independent State after it has made a notification establishing its status as a party or as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but in respect of which the predecessor State was a contracting State; or

(c) By a successor State other than a newly independent State in respect of a treaty which, following the succession of States, continues in force for that State.

[73] Draft guideline 5.10 read as follows:

5.10 Maintenance by the successor State of objections formulated by the predecessor State

Subject to the provisions of guideline 5.11, a successor State shall be considered as maintaining any objection formulated by the predecessor State to a reservation formulated by a contracting State or contracting international organization or by a State party or international organization party to a treaty unless it expresses a contrary intention at the time of the succession.

93. Draft guideline 5.11[74] nevertheless posited two exceptions to the presumption in favour of the maintenance of objections in the event of a uniting of States. While the exception cited in paragraph 1 was the same as that set out in draft guideline 5.3 concerning reservations, the exception set out in paragraph 2 was specific to objections and posited the non-maintenance of objections to reservations identical or equivalent to a reservation maintained by the successor State itself.

94. Draft guideline 5.12,[75] which addressed the status of objections to reservations of the predecessor State, provided for the maintenance of objections that had been formulated by a contracting State or organization in respect of a reservation that was considered to be maintained by a successor State. That solution appeared to be grounded both in logic and in common sense.

95. Draft guideline 5.13[76] addressed the question of reservations of the predecessor State that had not elicited objections as of the date of the succession of States. In that connection, it would seem logical to consider that a succession of States could not provide a contracting State or organization with a valid pretext for objecting to a reservation after the expiry of the time period stipulated for that purpose. On the other hand, it ought to be possible for the successor State to formulate an objection if the time period in question had not yet elapsed as of the date of the succession, provided that the State did so within that time period.

96. The capacity of a successor State to formulate objections to reservations formulated prior to the date of the succession of States called for solutions comparable to those

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[74] Draft guideline 5.11 read as follows:

5.11 Irrelevance of certain objections in cases involving a uniting of States

1. When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of any of them continues in force in respect of the State so formed, such objections to a reservation as may have been formulated by any such State which, at the date of the succession of States, was a contracting State in respect of which the treaty was not in force shall not be maintained.

2. When, following a uniting of two or more States, the successor State is a party or a contracting State to a treaty to which it has maintained reservations [in conformity with guidelines 5.1 or 5.2], objections to a reservation made by another contracting State or contracting international organization or by a State or international organization party to the treaty shall not be maintained if the reservation is identical or equivalent to a reservation which the successor State itself has maintained.

[75] Draft guideline 5.12 read as follows:

5.12 Maintenance of objections formulated by another State or international organization to reservations of the predecessor State

When a reservation formulated by the predecessor State is considered as being maintained by the successor State [in conformity with guideline 5.1 or 5.2], any objection to that reservation formulated by another contracting State or State party or by a contracting international organization or international organization party to the treaty shall be considered as being maintained in respect of the successor State.

[76] Draft guideline 5.13 read as follows:

5.13 Reservations of the predecessor State to which no objections have been made

When a reservation formulated by the predecessor State is considered as being maintained by the successor State [in conformity with guideline 5.1 or 5.2], a contracting State or State party or a contracting international organization or international organization party to the treaty that had not objected to the reservation in respect of the predecessor State shall not have capacity to object to it in respect of the successor State unless the time period for formulating an objection has not yet expired at the date of the succession of States and the objection is made within that time period.

identified in the context of reservations. Accordingly, draft guideline 5.14[77] recognized the successor State that capacity in cases where the succession occurred as the result of an expression of intent; that was the case of newly independent States, cited in paragraph 1, but also of other successor States *vis-à-vis* treaties in respect of which the predecessor State had been a contracting State but which had not been in force for the predecessor State at the time of the succession of States; the latter case was addressed in paragraph 2. An exception to a successor State's capacity to formulate objections was nevertheless provided for in paragraph 3, which dealt with reservations that required unanimous acceptance, the objective being to prevent the successor State from being able to undermine existing treaty relationships by compelling the author of the reservation, by means of an objection to the reservation, to withdraw from the treaty.

97. At the same time, owing to the *ipso jure* nature of succession and applying the same logic used in the case of reservations, a successor State other than a newly independent State, for which the treaty remained in force following a uniting or separating of States, could not be considered to enjoy the capacity to formulate an objection to a reservation formulated prior to the date of the succession of States unless on that date the time period prescribed for the formulation of an objection had not elapsed for the predecessor State and the successor State formulated its objection within that period. That was the solution identified in draft guideline 5.15.[78]

98. Draft guideline 5.16[79] simply recalled that any contracting State or organization had the capacity to object, under conditions specified in the relevant guidelines of the Guide to Practice, to a reservation formulated by a successor State.

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[77] Draft guideline 5.14 read as follows:

5.14 Capacity of a successor State to formulate objections to reservations

1. When making a notification of succession establishing its status as a party or as a contracting State to a treaty, a newly independent State may, in the conditions laid down in the relevant guidelines of the Guide to Practice and subject to paragraph 3 of the present guideline, object to reservations formulated by a contracting State or State party or by a contracting international organization or international organization party to the treaty, even if the predecessor State made no such objection.

2. A successor State other than a newly independent State shall also have the capacity provided for in paragraph 1 when making a notification establishing its status as a party or as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but in respect of which the predecessor State was a contracting State.

3. The capacity referred to in the foregoing paragraphs shall nonetheless not be recognized in the case of treaties falling under guidelines 2.8.2 and [4.X.X[*]].

[* The number of the guideline in the Guide to Practice that reproduces article 20, paragraph 2, of the 1969 and 1986 Vienna Conventions should be inserted in place of the brackets.]

[78] Draft guideline 5.15 read as follows:

5.15 Objections by a successor State other than a newly independent State in respect of which a treaty continues in force

A successor State other than a newly independent State in respect of which a treaty continues in force following a succession of States shall not have capacity to formulate an objection to a reservation to which the predecessor State had not objected unless the time period for formulating an objection has not yet expired at the date of the succession of States and the objection is made within that time period.

[79] Draft guideline 5.16 read as follows:

5.16 Objections to reservations of the successor State

99. Draft guidelines 5.16 *bis* to 5.18, which had been proposed in an addendum to the sixteenth report (A/CN.4/626/Add.1), dealt with acceptances of reservations in the context of succession of States. The only question that remained to be settled in that regard concerned the status of express acceptances that might have been formulated by a predecessor State with regard to the reservations formulated by another contracting State or organization. Actually, the question of the status of a tacit acceptance of a reservation by a predecessor State that had not objected to the reservation in time had already been settled in draft guidelines 5.14 and 5.15, discussed above. Furthermore, it was not necessary to devote a draft guideline to the capacity of a successor State to accept a reservation formulated prior to the date of the succession, since it had been acknowledged in guideline 2.8.3 that all States had that capacity at all times. As in the case of reservations and objections, the question of the status of express acceptances called for different solutions, depending on the voluntary or *ipso jure* nature of the succession to the treaty.

100. Draft guideline 5.16 *bis*[80] established the principle that a newly independent State maintained the acceptances formulated by the predecessor State while recognizing that such a successor State had the capacity to express a contrary intention within a period of 12 months from the date of the succession of States. The Special Rapporteur considered that the presumption in favour of the maintenance of reservations could be logically transposed to express acceptances. In addition, owing to the voluntary nature of succession to treaties by newly independent States, that presumption should be accompanied by the capacity, on the part of such States, to express their intention not to maintain an express acceptance formulated by the predecessor State. As the non-maintenance of an express acceptance could be likened, on the basis of its potential effects or even its modalities, to the formulation of an objection, it would seem logical to make the exercise of that capacity conditional on observance of the 12-month period prescribed for the formulation of objections in guideline 2.6.13, which was implicitly referred to in draft guideline 5.14.

101. Successor States other than newly independent States could be recognized as having the capacity to go back on an express acceptance formulated by the predecessor State only in cases where the succession to the treaty occurred not *ipso jure* but as the result of a notification – specifically, under the 1978 Vienna Convention, in cases when on the date of succession a predecessor State was a contracting State to a treaty that had not yet entered into force for that State. Such was the solution, adapted to suit various cases, presented in draft guideline 5.17.[81]

Any contracting State or contracting international organization may formulate objections to any reservation formulated by the successor State in the conditions laid down in the relevant guidelines of the Guide to Practice.

[80] Draft guideline 5.16 *bis* read as follows:

5.16 *bis* Maintenance by a newly independent State of express acceptances formulated by the predecessor State

When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty, it shall be considered as maintaining any express acceptance by the predecessor State of a reservation formulated by a contracting State or contracting international organization unless it expresses a contrary intention within 12 months of the date of the notification of succession.

[81] Draft guideline 5.17 read as follows:

5.17 Maintenance by a successor State other than a newly independent State of the express acceptances formulated by the predecessor State

1. A successor State, other than a newly independent State, for which a treaty remains in force following a succession of States shall be considered as maintaining any express acceptance by the predecessor State of a reservation formulated by a contracting State or by a contracting

102. Draft guideline 5.18,[82] which concerned the timing of the effects of non-maintenance by a successor State of an express acceptance formulated by the predecessor State, reproduced *mutatis mutandis* the solution contained in draft guideline 5.7, concerning the timing of effects of non-maintenance of a reservation.

103. Turning lastly to interpretative declarations, on which the 1978 Vienna Convention was silent, the starting point was the principle, posited in guideline 2.4.3, according to which a State could formulate such declarations at any time. As there was no reason to believe that a successor State should be deprived of such capacity, the point did not require any particular development in the context of succession of States. A draft guideline was, however, needed to address the status of interpretative declarations formulated by the predecessor State. In that connection, and given in particular the diversity of interpretative declarations, and the uncertainty as to their effects, the Commission might wish to limit itself to suggesting to States that they should clarify the status of such declarations, it being understood that in certain situations the position of the successor State *vis-à-vis* a declaration could be deduced from its conduct. Such was the sense of draft guideline 5.19.[83]

3. Content of the final report on the topic

104. The Special Rapporteur also stated that he intended to submit a final report in which he planned to make an appraisal of the topic and propose two annexes to the Guide to Practice that would deal respectively with the "reservations dialogue" and the settlement of disputes relating to reservations.

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international organization.

2. When making a notification of succession establishing its status as a contracting State or as a party to a treaty which, on the date of the succession of States, was not in force for the predecessor State but to which the predecessor State was a contracting party, a successor State other than a newly independent State shall be considered as maintaining any express acceptance by the predecessor State of a reservation formulated by a contracting State or by a contracting international organization unless it expresses a contrary intention within 12 months of the date of the notification of succession.

[82] Draft guideline 5.18 read as follows:

5.18 Timing of the effects of non-maintenance by a successor State of an express acceptance formulated by the predecessor State

The non-maintenance[, in accordance with guidelines 5.16 and 5.17, paragraph 2,] by the successor State of the predecessor State's express acceptance of a reservation formulated by a contracting State or by a contracting international organization shall take effect for a contracting State or for a contracting international organization when that State or that organization has received the notification thereof.

[83] Draft guideline 5.19 read as follows:

5.19 Clarification of the status of interpretative declarations formulated by the predecessor State

1. A successor State should, to the extent possible, clarify its position concerning the status of interpretative declarations formulated by the predecessor State.

2. The preceding paragraph is without prejudice to situations in which the successor State has demonstrated, by its conduct, its intention to maintain or to reject an interpretative declaration formulated by the predecessor State.

C. Text of the set of draft guidelines constituting the Guide to Practice on Reservations to Treaties, provisionally adopted by the Commission

1. Text of the set of draft guidelines

105. The text of the set of draft guidelines[84] constituting the Guide to Practice on Reservations to Treaties, provisionally adopted by the Commission, is reproduced below.

Reservations to treaties

Guide to Practice

Explanatory note[85]

Some guidelines in the present Guide to Practice are accompanied by model clauses. The adoption of these model clauses may have advantages in specific circumstances. The user should refer to the commentaries for an assessment of the circumstances appropriate for the use of a particular model clause.

1. Definitions

1.1 Definition of reservations[86]

"Reservation" means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

1.1.1 [1.1.4][87] Object of reservations[88]

A reservation purports to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects in their application to the State or to the international organization which formulates the reservation.

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[84] At its 2991st meeting, on 5 August 2008, the Commission decided that, while the expression "draft guidelines" would continue to be used in the title, the text of the report would simply refer to "guidelines". This decision is purely editorial and is without prejudice to the legal status of the draft guidelines adopted by the Commission.

[85] For the commentary, see *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), p. 189.

[86] For the commentary to this guideline, see *ibid., Fifty-third Session, Supplement No. 10* (A/53/10), pp. 196–199.

[87] The number between square brackets indicates the number of this guideline in the report of the Special Rapporteur or, as the case may be, the original number of a guideline in the report of the Special Rapporteur which has been merged with the final guideline.

[88] For the commentary to this guideline, see *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 210–217.

1.1.2 Instances in which reservations may be formulated[89]

Instances in which a reservation may be formulated under guideline 1.1 include all the means of expressing consent to be bound by a treaty mentioned in article 11 of the Vienna Conventions of 1969 and 1986 on the law of treaties.

1.1.3 [1.1.8] Reservations having territorial scope[90]

A unilateral statement by which a State purports to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement constitutes a reservation.

1.1.4 [1.1.3] Reservations formulated when notifying territorial application[91]

A unilateral statement by which a State purports to exclude or to modify the legal effect of certain provisions of a treaty in relation to a territory in respect of which it makes a notification of the territorial application of the treaty constitutes a reservation.

1.1.5 [1.1.6] Statements purporting to limit the obligations of their author[92]

A unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty by which its author purports to limit the obligations imposed on it by the treaty constitutes a reservation.

1.1.6 Statements purporting to discharge an obligation by equivalent means[93]

A unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty, by which that State or that organization purports to discharge an obligation pursuant to the treaty in a manner different from but equivalent to that imposed by the treaty, constitutes a reservation.

1.1.7 [1.1.1] Reservations formulated jointly[94]

The joint formulation of a reservation by several States or international organizations does not affect the unilateral nature of that reservation.

1.1.8 Reservations made under exclusionary clauses[95]

A unilateral statement made by a State or an international organization when that State or organization expresses its consent to be bound by a treaty, in accordance with a clause expressly authorizing the parties or some of them to exclude or to modify the legal effect of certain provisions of the treaty in their application to those parties, constitutes a reservation.

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[89] For the commentary to this guideline, see *ibid., Fifty-third Session, Supplement No. 10* (A/53/10), pp. 203–206.

[90] For the commentary to this guideline, see *ibid.*, pp. 206–209.

[91] For the commentary to this guideline, see *ibid.*, pp. 209–210.

[92] For the commentary to this guideline, see *ibid., Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 217–221.

[93] For the commentary to this guideline, see *ibid.*, pp. 222–223.

[94] For the commentary to this guideline, see *ibid., Fifty-third Session, Supplement No. 10* (A/53/10), pp. 210–213.

[95] For the commentary to this guideline, see *ibid., Fifty-fifth Session, Supplement No. 10* (A/55/10), pp. 230–241.

1.2 Definition of interpretative declarations[96]

"Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.

1.2.1 [1.2.4] Conditional interpretative declarations[97]

A unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof, shall constitute a conditional interpretative declaration.

1.2.2 [1.2.1] Interpretative declarations formulated jointly[98]

The joint formulation of an interpretative declaration by several States or international organizations does not affect the unilateral nature of that interpretative declaration.

1.3 Distinction between reservations and interpretative declarations[99]

The character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce.

1.3.1 Method of implementation of the distinction between reservations and interpretative declarations[100]

To determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration, it is appropriate to interpret the statement in good faith in accordance with the ordinary meaning to be given to its terms, in light of the treaty to which it refers. Due regard shall be given to the intention of the State or the international organization concerned at the time the statement was formulated.

1.3.2 [1.2.2] Phrasing and name[101]

The phrasing or name given to a unilateral statement provides an indication of the purported legal effect. This is the case in particular when a State or an international organization formulates several unilateral statements in respect of a single treaty and designates some of them as reservations and others as interpretative declarations.

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[96] For the commentary to this guideline, see *ibid., Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 223–240.

[97] For the commentary to this guideline, see *ibid.*, pp. 240–249.

[98] For the commentary to this guideline, see *ibid.*, pp. 249–252.

[99] For the commentary to this guideline, see *ibid.*, pp. 252–253.

[100] For the commentary to this guideline, see *ibid.*, pp. 254–260.

[101] For the commentary to this guideline, see *ibid.*, pp. 260–266.

1.3.3 [1.2.3] Formulation of a unilateral statement when a reservation is prohibited[102]

When a treaty prohibits reservations to all or certain of its provisions, a unilateral statement formulated in respect thereof by a State or an international organization shall be presumed not to constitute a reservation except when it purports to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to its author.

1.4 Unilateral statements other than reservations and interpretative declarations[103]

Unilateral statements formulated in relation to a treaty which are not reservations nor interpretative declarations are outside the scope of the present Guide to Practice.

1.4.1 [1.1.5] Statements purporting to undertake unilateral commitments[104]

A unilateral statement formulated by a State or an international organization in relation to a treaty whereby its author purports to undertake obligations going beyond those imposed on it by the treaty constitutes a unilateral commitment which is outside the scope of the present Guide to Practice.

1.4.2 [1.1.6] Unilateral statements purporting to add further elements to a treaty[105]

A unilateral statement whereby a State or an international organization purports to add further elements to a treaty constitutes a proposal to modify the content of the treaty which is outside the scope of the present Guide to Practice.

1.4.3 [1.1.7] Statements of non-recognition[106]

A unilateral statement by which a State indicates that its participation in a treaty does not imply recognition of an entity which it does not recognize constitutes a statement of non-recognition which is outside the scope of the present Guide to Practice even if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity.

1.4.4 [1.2.5] General statements of policy[107]

A unilateral statement formulated by a State or by an international organization whereby that State or that organization expresses its views on a treaty or on the subject matter covered by the treaty, without purporting to produce a legal effect on the treaty, constitutes a general statement of policy which is outside the scope of the present Guide to Practice.

1.4.5 [1.2.6] Statements concerning modalities of implementation of a treaty at the internal level[108]

A unilateral statement formulated by a State or an international organization whereby that State or that organization indicates the manner in which it intends to implement a treaty at the internal level, without purporting as such to affect its rights and obligations towards the other Contracting Parties, constitutes an informative statement which is outside the scope of the present Guide to Practice.

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[102] For the commentary to this guideline, see *ibid.*, pp. 268–270.

[103] For the commentary to this guideline, see *ibid.*, pp. 268–270.

[104] For the commentary to this guideline, see *ibid.*, pp. 270–273.

[105] For the commentary to this guideline, see *ibid.*, pp. 273–274.

[106] For the commentary to this guideline, see *ibid.*, pp. 275–280.

[107] For the commentary to this guideline, see *ibid.*, pp. 280–284.

[108] For the commentary to this guideline, see *ibid.*, pp. 284–289.

1.4.6 [1.4.6, 1.4.7] Unilateral statements made under an optional clause[109]

A unilateral statement made by a State or by an international organization, in accordance with a clause in a treaty expressly authorizing the parties to accept an obligation that is not otherwise imposed by the treaty, is outside the scope of the present Guide to Practice.

A restriction or condition contained in such statement does not constitute a reservation within the meaning of the present Guide to Practice.

1.4.7 [1.4.8] Unilateral statements providing for a choice between the provisions of a treaty[110]

A unilateral statement made by a State or an international organization, in accordance with a clause in a treaty that expressly requires the parties to choose between two or more provisions of the treaty, is outside the scope of the present Guide to Practice.

1.5 Unilateral statements in respect of bilateral treaties[111]

1.5.1 [1.1.9] "Reservations" to bilateral treaties[112]

A unilateral statement, however phrased or named, formulated by a State or an international organization after initialling or signature but prior to entry into force of a bilateral treaty, by which that State or that organization purports to obtain from the other party a modification of the provisions of the treaty to which it is subjecting the expression of its final consent to be bound, does not constitute a reservation within the meaning of the present Guide to Practice.

1.5.2 [1.2.7] Interpretative declarations in respect of bilateral treaties[113]

Guidelines 1.2 and 1.2.1 are applicable to interpretative declarations in respect of multilateral as well as bilateral treaties.

1.5.3 [1.2.8] Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party[114]

The interpretation resulting from an interpretative declaration made in respect of a bilateral treaty by a State or an international organization party to the treaty and accepted by the other party constitutes the authentic interpretation of that treaty.

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[109] For the commentary to this guideline, see *ibid., Fifty-fifth Session, Supplement No. 10* (A/55/10), pp. 241–247.

[110] For the commentary to this guideline, see *ibid.*, pp. 247–252.

[111] For the commentary, see *ibid., Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 289–290.

[112] For the commentary to this guideline, see *ibid.*, pp. 290–302.

[113] For the commentary to this guideline, see *ibid.*, pp. 302–306.

[114] For the commentary to this guideline, see *ibid.*, pp. 306–307.

1.6 Scope of definitions[115]

The definitions of unilateral statements included in the present chapter of the Guide to Practice are without prejudice to the validity and effects of such statements under the rules applicable to them.

1.7 Alternatives to reservations and interpretative declarations[116]

1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4] Alternatives to reservations[117]

In order to achieve results comparable to those effected by reservations, States or international organizations may also have recourse to alternative procedures, such as:

- The insertion in the treaty of restrictive clauses purporting to limit its scope or application
- The conclusion of an agreement, under a specific provision of a treaty, by which two or more States or international organizations purport to exclude or modify the legal effects of certain provisions of the treaty as between themselves

1.7.2 [1.7.5] Alternatives to interpretative declarations[118]

In order to specify or clarify the meaning or scope of a treaty or certain of its provisions, States or international organizations may also have recourse to procedures other than interpretative declarations, such as:

- The insertion in the treaty of provisions purporting to interpret the same treaty
- The conclusion of a supplementary agreement to the same end

2. Procedure

2.1 Form and notification of reservations

2.1.1 Written form[119]

A reservation must be formulated in writing.

2.1.2 Form of formal confirmation[120]

Formal confirmation of a reservation must be made in writing.

2.1.3 Formulation of a reservation at the international level[121]

1. Subject to the customary practices in international organizations which are depositaries of treaties, a person is considered as representing a State or an international organization for the purpose of formulating a reservation if:

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[115] This guideline was reconsidered and modified during the fifty-eighth session (2006). For the new commentary see *ibid., Sixty-first Session, Supplement No. 10* (A/61/10), pp. 356–359.

[116] For the commentary see *ibid., Fifty-fifth Session, Supplement No. 10* (A/55/10), pp. 252–253.

[117] For the commentary to this guideline, see *ibid.*, pp. 253–269.

[118] For the commentary to this guideline, see *ibid.*, pp. 270–272.

[119] For the commentary to this guideline, see *ibid., Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 63–67.

[120] For the commentary to this guideline, see *ibid.*, pp. 67–69.

[121] For the commentary to this guideline, see *ibid.*, pp. 69–75.

(a) That person produces appropriate full powers for the purposes of adopting or authenticating the text of the treaty with regard to which the reservation is formulated or expressing the consent of the State or organization to be bound by the treaty; or

(b) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.

2. By virtue of their functions and without having to produce full powers, the following are considered as representing a State for the purpose of formulating a reservation at the international level:

(a) Heads of State, heads of Government and Ministers for Foreign Affairs;

(b) Representatives accredited by States to an international conference for the purpose of formulating a reservation to a treaty adopted at that conference;

(c) Representatives accredited by States to an international organization or one of its organs, for the purpose of formulating a reservation to a treaty adopted by that organization or body;

(d) Heads of permanent missions to an international organization, for the purpose of formulating a reservation to a treaty between the accrediting States and that organization.

2.1.4 [2.1.3 *bis*, 2.1.4] Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations[122]

The determination of the competent authority and the procedure to be followed at the internal level for formulating a reservation is a matter for the internal law of each State or relevant rules of each international organization.

A State or an international organization may not invoke the fact that a reservation has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating reservations as invalidating the reservation.

2.1.5 Communication of reservations[123]

A reservation must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

A reservation to a treaty in force which is the constituent instrument of an international organization or to a treaty which creates an organ that has the capacity to accept a reservation must also be communicated to such organization or organ.

2.1.6 [2.1.6, 2.1.8] Procedure for communication of reservations[124]

Unless otherwise provided in the treaty or agreed by the contracting States and international contracting organizations, a communication relating to a reservation to a treaty shall be transmitted:

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[122] For the commentary to this guideline, see *ibid.*, pp. 75–79.

[123] For the commentary to this guideline, see *ibid.*, pp. 80–93.

[124] For the commentary to this guideline, see *ibid.*, *Sixty-third Session*, *Supplement No. 10* (A/63/10), pp. 174–184.

(i) If there is no depositary, directly by the author of the reservation to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty; or

(ii) If there is a depositary, to the latter, which shall notify the States and international organizations for which it is intended as soon as possible.

A communication relating to a reservation shall be considered as having been made with regard to a State or an international organization only upon receipt by that State or organization.

Where a communication relating to a reservation to a treaty is made by electronic mail or by facsimile, it must be confirmed by diplomatic note or depositary notification. In such a case the communication is considered as having been made at the date of the electronic mail or the facsimile.

2.1.7 Functions of depositaries[125]

The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form and, if need be, bring the matter to the attention of the State or international organization concerned.

In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(a) The signatory States and organizations and the contracting States and contracting organizations; or

(b) Where appropriate, the competent organ of the international organization concerned.

2.1.8 [2.1.7 *bis*] Procedure in case of manifestly impermissible reservations[126]

Where, in the opinion of the depositary, a reservation is manifestly impermissible, the depositary shall draw the attention of the author of the reservation to what, in the depositary's view, constitutes the grounds for the impermissibility of the reservation.

If the author of the reservation maintains the reservation, the depositary shall communicate the text of the reservation to the signatory States and international organizations and to the contracting States and international organizations and, where appropriate, the competent organ of the international organization concerned, indicating the nature of legal problems raised by the reservation.

2.1.9 Statement of reasons[127]

A reservation should to the extent possible indicate the reasons why it is being made.

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[125] For the commentary to this guideline, see *ibid., Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 105–112.

[126] This guideline was reconsidered and modified during the fifty-eighth session (2006). For the new commentary, see *ibid., Sixty-first Session, Supplement No. 10* (A/61/10), pp. 359–361.

[127] For the commentary to this guideline, see *ibid., Sixty-third Session, Supplement No. 10* (A/63/10), pp. 184–189.

2.2 Confirmation of reservations

2.2.1 Formal confirmation of reservations formulated when signing a treaty[128]

If formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

2.2.2 [2.2.3] Instances of non-requirement of confirmation of reservations formulated when signing a treaty[129]

A reservation formulated when signing a treaty does not require subsequent confirmation when a State or an international organization expresses by its signature the consent to be bound by the treaty.

2.2.3 [2.2.4] Reservations formulated upon signature when a treaty expressly so provides[130]

A reservation formulated when signing a treaty, where the treaty expressly provides that a State or an international organization may make such a reservation at that time, does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty ...[131]

2.3 Late reservations

2.3.1 Late formulation of a reservation[132]

Unless the treaty provides otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the reservation.

2.3.2 Acceptance of late formulation of a reservation[133]

Unless the treaty provides otherwise or the well-established practice followed by the depositary differs, late formulation of a reservation shall be deemed to have been accepted by a Contracting Party if it has made no objections to such formulation after the expiry of the 12-month period following the date on which notification was received.

2.3.3 Objection to late formulation of a reservation[134]

If a Contracting Party to a treaty objects to late formulation of a reservation, the treaty shall enter into or remain in force in respect of the reserving State or international organization without the reservation being established.

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[128] For the commentary to this guideline, see *ibid., Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 465–472.

[129] For the commentary to this guideline, see *ibid.*, pp. 472–474.

[130] For the commentary to this guideline, see *ibid.*, pp. 474–477.

[131] Section 2.3 proposed by the Special Rapporteur deals with the late formulation of reservations.

[132] For the commentary to this guideline, see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 477–489.

[133] For the commentary to this guideline, see *ibid.*, pp. 490–493.

[134] For the commentary to this guideline, see *ibid.*, pp. 493–495.

2.3.4 Subsequent exclusion or modification of the legal effect of a treaty by means other than reservations[135]

A Contracting Party to a treaty may not exclude or modify the legal effect of provisions of the treaty by:

(a) Interpretation of a reservation made earlier; or

(b) A unilateral statement made subsequently under an optional clause.

2.3.5 Widening of the scope of a reservation[136]

The modification of an existing reservation for the purpose of widening its scope shall be subject to the rules applicable to the late formulation of a reservation. However, if an objection is made to that modification, the initial reservation remains unchanged.

2.4 Procedure for interpretative declarations[137]

2.4.0 Form of interpretative declarations[138]

An interpretative declaration should preferably be formulated in writing.

2.4.1 Formulation of interpretative declarations[139]

An interpretative declaration must be formulated by a person who is considered as representing a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of the State or international organization to be bound by a treaty.

[2.4.2 [2.4.1 *bis*] Formulation of an interpretative declaration at the internal level[140]

The determination of the competent authority and the procedure to be followed at the internal level for formulating an interpretative declaration is a matter for the internal law of each State or relevant rules of each international organization.

A State or an international organization may not invoke the fact that an interpretative declaration has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating interpretative declarations as invalidating the declaration.]

2.4.3 Time at which an interpretative declaration may be formulated[141]

Without prejudice to the provisions of guidelines 1.2.1, 2.4.6 [2.4.7] and 2.4.7 [2.4.8], an interpretative declaration may be formulated at any time.

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[135] For the commentary to this guideline, see *ibid.*, pp. 495–499.

[136] For the commentary to this guideline, see *ibid.*, *Fifty-ninth Session, Supplement No. 10* (A/59/10), pp. 269–274.

[137] For the commentary to this guideline, see *ibid.*, *Fifty-seventh Session, Supplement No. 10* (A/57/10), p. 115.

[138] For the commentary to this guideline, see *ibid.*, *Sixty-fourth Session, Supplement No. 10* (A/64/10), pp. 221–223.

[139] For the commentary to this guideline, see *ibid.*, *Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 115–116.

[140] For the commentary to this guideline, see *ibid.*, pp. 117–118.

[141] For the commentary to this guideline, see *ibid.*, *Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 499–501.

2.4.3 *bis* Communication of interpretative declarations[142]

The communication of written interpretative declarations should be made, *mutatis mutandis*, in accordance with the procedure established in guidelines 2.1.5, 2.1.6 and 2.1.7.

2.4.4 [2.4.5] Non-requirement of confirmation of interpretative declarations made when signing a treaty[143]

An interpretative declaration made when signing a treaty does not require subsequent confirmation when a State or an international organization expresses its consent to be bound by the treaty.

[2.4.5 [2.4.4] Formal confirmation of conditional interpretative declarations formulated when signing a treaty[144]

If a conditional interpretative declaration is formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, it must be formally confirmed by the declaring State or international organization when expressing its consent to be bound by the treaty. In such a case the interpretative declaration shall be considered as having been made on the date of its confirmation.][145]

2.4.6 [2.4.7] Late formulation of an interpretative declaration[146]

Where a treaty provides that an interpretative declaration may be made only at specified times, a State or an international organization may not formulate an interpretative declaration concerning that treaty subsequently except if none of the other Contracting Parties objects to the late formulation of the interpretative declaration.

[2.4.7 [2.4.2, 2.4.9] Formulation and communication of conditional interpretative declarations[147]

A conditional interpretative declaration must be formulated in writing.

Formal confirmation of a conditional interpretative declaration must also be made in writing.

A conditional interpretative declaration must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

A conditional interpretative declaration regarding a treaty in force which is the constituent instrument of an international organization or a treaty which creates an organ that has the capacity to accept a reservation must also be communicated to such organization or organ.]

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[142] For the commentary to this guideline, see *ibid., Sixty-fourth Session, Supplement No. 10* (A/64/10), pp. 223–224.

[143] For the commentary to this guideline, see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 501–502.

[144] For the commentary to this guideline, see *ibid.*, pp. 502–503.

[145] The guidelines on conditional interpretative declarations have been placed in square brackets, pending a final determination by the Commission on whether the legal regime of such declarations entirely follows that of reservations. As this appears to be the case, these guidelines will be replaced by a single provision equating these declarations with reservations.

[146] For the commentary to this guideline, see *ibid.*, pp. 503–505.

[147] For the commentary to this guideline, see *ibid., Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 118–119.

[2.4.8 Late formulation of a conditional interpretative declaration[148]

A State or an international organization may not formulate a conditional interpretative declaration concerning a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the conditional interpretative declaration.]

2.4.9 Modification of an interpretative declaration[149]

Unless the treaty provides that an interpretative declaration may be made or modified only at specified times, an interpretative declaration may be modified at any time.

[2.4.10 Limitation and widening of the scope of a conditional interpretative declaration[150]

The limitation and the widening of the scope of a conditional interpretative declaration are governed by the rules respectively applicable to the partial withdrawal and the widening of the scope of reservations.]

2.5 Withdrawal and modification of reservations and interpretative declarations

2.5.1 Withdrawal of reservations[151]

Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State or of an international organization which has accepted the reservation is not required for its withdrawal.

2.5.2 Form of withdrawal[152]

The withdrawal of a reservation must be formulated in writing.

2.5.3 Periodic review of the usefulness of reservations[153]

States or international organizations which have made one or more reservations to a treaty should undertake a periodic review of such reservations and consider withdrawing those which no longer serve their purpose.

In such a review, States and international organizations should devote special attention to the aim of preserving the integrity of multilateral treaties and, where relevant, give consideration to the usefulness of retaining the reservations, in particular in relation to developments in their internal law since the reservations were formulated.

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[148] For the commentary to this guideline, see *ibid., Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 505–506. This guideline (formerly 2.4.7 [2.4.8]) was renumbered as a result of the adoption of new guidelines at the fifty-fourth session.

[149] For the commentary to this guideline, see *ibid., Fifty-ninth Session, Supplement No. 10* (A/59/10), pp. 275–277.

[150] For the commentary to this guideline, see *ibid.*, pp. 277–278.

[151] For the commentary to this guideline, see *ibid., Fifty-eighth Session, Supplement No. 10* (A/58/10), pp. 190–201.

[152] For the commentary to this guideline, see *ibid.*, pp. 201–207.

[153] For the commentary to this guideline, see *ibid.*, pp. 207–209.

2.5.4 [2.5.5] Formulation of the withdrawal of a reservation at the international level[154]

1. Subject to the usual practices in international organizations which are depositaries of treaties, a person is competent to withdraw a reservation made on behalf of a State or an international organization if:

(a) That person produces appropriate full powers for the purposes of that withdrawal; or

(b) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.

2. By virtue of their functions and without having to produce full powers, the following are competent to withdraw a reservation at the international level on behalf of a State:

(a) Heads of State, heads of Government and Ministers for Foreign Affairs;

(b) Representatives accredited by States to an international organization or one of its organs, for the purpose of withdrawing a reservation to a treaty adopted by that organization or body;

(c) Heads of permanent missions to an international organization, for the purpose of withdrawing a reservation to a treaty between the accrediting States and that organization.

2.5.5 [2.5.5 *bis*, 2.5.5 *ter*] Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations[155]

The determination of the competent body and the procedure to be followed for withdrawing a reservation at the internal level is a matter for the internal law of each State or the relevant rules of each international organization.

A State or an international organization may not invoke the fact that a reservation has been withdrawn in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for the withdrawal of reservations as invalidating the withdrawal.

2.5.6 Communication of withdrawal of a reservation[156]

The procedure for communicating the withdrawal of a reservation follows the rules applicable to the communication of reservations contained in guidelines 2.1.5, 2.1.6 [2.1.6, 2.1.8] and 2.1.7.

2.5.7 [2.5.7, 2.5.8] Effect of withdrawal of a reservation[157]

The withdrawal of a reservation entails the application as a whole of the provisions on which the reservation had been made in the relations between the State or international organization which withdraws the reservation and all the other parties, whether they had accepted the reservation or objected to it.

The withdrawal of a reservation entails the entry into force of the treaty in the relations between the State or international organization which withdraws the reservation and a State or international organization which had objected to the reservation and opposed the entry into force of the treaty between itself and the reserving State or international organization by reason of that reservation.

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[154] For the commentary to this guideline, see *ibid.*, pp. 210–218.

[155] For the commentary to this guideline, see *ibid.*, pp. 219–221.

[156] For the commentary to this guideline, see *ibid.*, pp. 221–226.

[157] For the commentary to this guideline, see *ibid.*, pp. 227–231.

2.5.8 [2.5.9] Effective date of withdrawal of a reservation[158]

Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of a reservation becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization.

Model clauses

A. Deferment of the effective date of the withdrawal of a reservation[159]

A Contracting Party which has made a reservation to this treaty may withdraw it by means of notification addressed to [the depositary]. The withdrawal shall take effect on the expiration of a period of ... [months] [days] after the date of receipt of the notification by [the depositary].

B. Earlier effective date of withdrawal of a reservation[160]

A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date of receipt of such notification by [the depositary].

C. Freedom to set the effective date of withdrawal of a reservation[161]

A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date set by that State in the notification addressed to [the depositary].

2.5.9 [2.5.10] Cases in which a reserving State or international organization may unilaterally set the effective date of withdrawal of a reservation[162]

The withdrawal of a reservation takes effect on the date set by the withdrawing State or international organization where:

(a) That date is later than the date on which the other contracting States or international organizations received notification of it; or

(b) The withdrawal does not add to the rights of the withdrawing State or international organization, in relation to the other contracting States or international organizations.

2.5.10 [2.5.11] Partial withdrawal of a reservation[163]

The partial withdrawal of a reservation limits the legal effect of the reservation and achieves a more complete application of the provisions of the treaty, or of the treaty as a whole, to the withdrawing State or international organization.

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[158] For the commentary to this guideline, see *ibid.*, pp. 231–239.

[159] For the commentary to this model clause, see *ibid.*, p. 240.

[160] For the commentary to this model clause, see *ibid.*, pp. 240–241.

[161] For the commentary to this model clause, see *ibid.*, pp. 241–242.

[162] For the commentary to this guideline, see *ibid.*, pp. 242–244.

[163] For the commentary to this guideline, see *ibid.*, pp. 244–256.

The partial withdrawal of a reservation is subject to the same formal and procedural rules as a total withdrawal and takes effect on the same conditions.

2.5.11 [2.5.12] Effect of a partial withdrawal of a reservation[164]

The partial withdrawal of a reservation modifies the legal effect of the reservation to the extent of the new formulation of the reservation. Any objection made to the reservation continues to have effect as long as its author does not withdraw it, insofar as the objection does not apply exclusively to that part of the reservation which has been withdrawn.

No objection may be made to the reservation resulting from the partial withdrawal, unless that partial withdrawal has a discriminatory effect.

2.5.12 Withdrawal of an interpretative declaration[165]

An interpretative declaration may be withdrawn at any time by the authorities competent for that purpose, following the same procedure applicable to its formulation.

[2.5.13 Withdrawal of a conditional interpretative declaration[166]

The withdrawal of a conditional interpretative declaration is governed by the rules applying to the withdrawal of reservations.]

2.6 Formulation of objections

2.6.1 Definition of objections to reservations[167]

"Objection" means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the former State or organization purports to exclude or to modify the legal effects of the reservation, or to exclude the application of the treaty as a whole, in relations with the reserving State or organization.

2.6.2 Definition of objections to the late formulation or widening of the scope of a reservation[168]

"Objection" may also mean a unilateral statement whereby a State or an international organization opposes the late formulation of a reservation or the widening of the scope of a reservation.

2.6.3 Freedom to formulate objections[169]

A State or international organization may formulate an objection to a reservation irrespective of the permissibility of the reservation.

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[164] For the commentary to this guideline, see *ibid.*, pp. 256–259.

[165] For the commentary to this guideline, see *ibid.*, *Fifty-ninth Session, Supplement No. 10* (A/59/10), pp. 279–280.

[166] For the commentary to this guideline, see *ibid.*, p. 280.

[167] For the commentary to this guideline, see *ibid.*, *Sixtieth Session, Supplement No. 10* (A/60/10), pp. 186–202.

[168] For the commentary to this guideline, see *ibid.*, pp. 202–203.

[169] For the commentary to this guideline, see sect. C.2 below.

2.6.4 Freedom to oppose the entry into force of the treaty *vis-à-vis* the author of the reservation[170]

A State or international organization that formulates an objection to a reservation may oppose the entry into force of the treaty as between itself and the author of the reservation.

2.6.5 Author[171]

An objection to a reservation may be formulated by:

(i) Any contracting State and any contracting international organization; and

(ii) Any State and any international organization that is entitled to become a party to the treaty in which case such a declaration does not produce any legal effect until the State or the international organization has expressed its consent to be bound by the treaty.

2.6.6 Joint formulation[172]

The joint formulation of an objection by several States or international organizations does not affect the unilateral character of that objection.

2.6.7 Written form[173]

An objection must be formulated in writing.

2.6.8 Expression of intention to preclude the entry into force of the treaty[174]

When a State or international organization making an objection to a reservation intends to preclude the entry into force of the treaty as between itself and the reserving State or international organization, it shall definitely express its intention before the treaty would otherwise enter into force between them.

2.6.9 Procedure for the formulation of objections[175]

Guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7 are applicable *mutatis mutandis* to objections.

2.6.10 Statement of reasons[176]

An objection should to the extent possible indicate the reasons why it is being made.

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[170] For the commentary to this guideline, see sect. C.2 below.

[171] For the commentary to this guideline, see *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), pp. 189–193.

[172] For the commentary to this guideline, see *ibid.*, pp. 193–195.

[173] For the commentary to this guideline, see *ibid.*, pp. 195–197.

[174] For the commentary to this guideline, see *ibid.*, pp. 197–200.

[175] For the commentary to this guideline, see *ibid.*, pp. 200–203.

[176] For the commentary to this guideline, see *ibid.*, pp. 203–206.

2.6.11 Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation[177]

An objection to a reservation made by a State or an international organization prior to confirmation of the reservation in accordance with guideline 2.2.1 does not itself require confirmation.

2.6.12 Requirement of confirmation of an objection formulated prior to the expression of consent to be bound by a treaty[178]

An objection formulated prior to the expression of consent to be bound by the treaty does not need to be formally confirmed by the objecting State or international organization at the time it expresses its consent to be bound if that State or that organization had signed the treaty when it had formulated the objection; it must be confirmed if the State or the international organization had not signed the treaty.

2.6.13 Time period for formulating an objection[179]

Unless the treaty otherwise provides, a State or an international organization may formulate an objection to a reservation by the end of a period of 12 months after it was notified of the reservation or by the date on which such State or international organization expresses its consent to be bound by the treaty, whichever is later.

2.6.14 Conditional objections[180]

An objection to a specific potential or future reservation does not produce the legal effects of an objection.

2.6.15 Late objections[181]

An objection to a reservation formulated after the end of the time period specified in guideline 2.6.13 does not produce the legal effects of an objection made within that time period.

2.7 Withdrawal and modification of objections to reservations[182]

2.7.1 Withdrawal of objections to reservations[183]

Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

2.7.2 Form of withdrawal of objections to reservations[184]

The withdrawal of an objection to a reservation must be formulated in writing.

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[177] For the commentary to this guideline, see *ibid.*, pp. 206–208.

[178] For the commentary to this guideline, see *ibid.*, pp. 208–213.

[179] For the commentary to this guideline, see *ibid.*, pp. 213–217.

[180] For the commentary to this guideline, see *ibid.*, pp. 218–221.

[181] For the commentary to this guideline, see *ibid.*, pp. 221–225.

[182] For the commentary, see *ibid.*, pp. 225–228.

[183] For the commentary to this guideline, see *ibid.*, pp. 228–229.

[184] For the commentary to this guideline, see *ibid.*, p. 230.

2.7.3 Formulation and communication of the withdrawal of objections to reservations[185]

Guidelines 2.5.4, 2.5.5 and 2.5.6 are applicable *mutatis mutandis* to the withdrawal of objections to reservations.

2.7.4 Effect on reservation of withdrawal of an objection[186]

A State or an international organization that withdraws an objection formulated to a reservation is considered to have accepted that reservation.

2.7.5 Effective date of withdrawal of an objection[187]

Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.

2.7.6 Cases in which an objecting State or international organization may unilaterally set the effective date of withdrawal of an objection to a reservation[188]

The withdrawal of an objection becomes operative on the date set by its author where that date is later than the date on which the reserving State or international organization received notification of it.

2.7.7 Partial withdrawal of an objection[189]

Unless the treaty provides otherwise, a State or an international organization may partially withdraw an objection to a reservation. The partial withdrawal of an objection is subject to the same formal and procedural rules as a complete withdrawal and becomes operative on the same conditions.

2.7.8 Effect of a partial withdrawal of an objection[190]

The partial withdrawal modifies the legal effects of the objection on the treaty relations between the author of the objection and the author of the reservation to the extent of the new formulation of the objection.

2.7.9 Widening of the scope of an objection to a reservation[191]

A State or international organization which has made an objection to a reservation may widen the scope of that objection during the time period referred to in guideline 2.6.13 provided that the widening does not have as an effect the modification of treaty relations between the author of the reservation and the author of the objection.

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[185] For the commentary to this guideline, see *ibid.*, p. 230.

[186] For the commentary to this guideline, see *ibid.*, pp. 232–233.

[187] For the commentary to this guideline, see *ibid.*, pp. 233–236.

[188] For the commentary to this guideline, see *ibid.*, pp. 236–237.

[189] For the commentary to this guideline, see *ibid.*, pp. 237–240.

[190] For the commentary to this guideline, see *ibid.*, pp. 240–241.

[191] For the commentary to this guideline, see *ibid.*, pp. 241–243.

2.8 Formulation of acceptances of reservations

2.8.0 [2.8] Forms of acceptance of reservations[192]

The acceptance of a reservation may arise from a unilateral statement in this respect or silence kept by a contracting State or contracting international organization within the periods specified in guideline 2.6.13.

2.8.1 Tacit acceptance of reservations[193]

Unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation within the time period provided for in guideline 2.6.13.

2.8.2 Unanimous acceptance of reservations[194]

In the event of a reservation requiring unanimous acceptance by some or all States or international organizations which are parties or entitled to become parties to the treaty, such an acceptance once obtained is final.

2.8.3 Express acceptance of a reservation[195]

A State or an international organization may, at any time, expressly accept a reservation formulated by another State or international organization.

2.8.4 Written form of express acceptance[196]

The express acceptance of a reservation must be formulated in writing.

2.8.5 Procedure for formulating express acceptance[197]

Guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6, and 2.1.7 apply *mutatis mutandis* to express acceptances.

2.8.6 Non-requirement of confirmation of an acceptance made prior to formal confirmation of a reservation[198]

An express acceptance of a reservation made by a State or an international organization prior to confirmation of the reservation in accordance with guideline 2.2.1 does not itself require confirmation.

2.8.7 Acceptance of a reservation to the constituent instrument of an international organization[199]

When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

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[192] For the commentary to this guideline, see *ibid.*, pp. 243–248.

[193] For the commentary to this guideline, see *ibid.*, *Sixty-fourth Session, Supplement No. 10* (A/64/10), pp. 225–229.

[194] For the commentary to this guideline, see *ibid.*, pp. 230–232.

[195] For the commentary to this guideline, see *ibid.*, pp. 232–235.

[196] For the commentary to this guideline, see *ibid.*, pp. 235–236.

[197] For the commentary to this guideline, see *ibid.*, p. 236.

[198] For the commentary to this guideline, see *ibid.*, p 237–238.

[199] For the commentary to this guideline, see *ibid.*, pp. 238–242.

2.8.8 Organ competent to accept a reservation to a constituent instrument[200]

Subject to the rules of the organization, competence to accept a reservation to a constituent instrument of an international organization belongs to the organ competent to decide on the admission of a member to the organization, or to the organ competent to amend the constituent instrument or to the organ competent to interpret this instrument.

2.8.9 Modalities of the acceptance of a reservation to a constituent instrument[201]

Subject to the rules of the organization, the acceptance by the competent organ of the organization shall not be tacit. However, the admission of the State or the international organization which is the author of the reservation is tantamount to the acceptance of that reservation.

For the purposes of the acceptance of a reservation to the constituent instrument of an international organization, the individual acceptance of the reservation by States or international organizations that are members of the organization is not required.

2.8.10 Acceptance of a reservation to a constituent instrument that has not yet entered into force[202]

In the case set forth in guideline 2.8.7 and where the constituent instrument has not yet entered into force, a reservation is considered to have been accepted if no signatory State or signatory international organization has raised an objection to that reservation by the end of a period of 12 months after they were notified of that reservation. Such a unanimous acceptance once obtained is final.

2.8.11 Reaction by a member of an international organization to a reservation to its constituent instrument[203]

Guideline 2.8.7 does not preclude States or international organizations that are members of an international organization from taking a position on the permissibility or appropriateness of a reservation to a constituent instrument of the organization. Such an opinion is in itself devoid of legal effects.

2.8.12 Final nature of acceptance of a reservation[204]

Acceptance of a reservation cannot be withdrawn or amended.

2.9 Formulation of reactions to interpretative declarations

2.9.1 Approval of an interpretative declaration[205]

"Approval" of an interpretative declaration means a unilateral statement made by a State or an international organization in reaction to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization expresses agreement with the interpretation formulated in that declaration.

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[200] For the commentary to this guideline, see *ibid.*, pp. 242–243.
[201] For the commentary to this guideline, see *ibid.*, pp. 244–246.
[202] For the commentary to this guideline, see *ibid.*, pp. 246–249.
[203] For the commentary to this guideline, see *ibid.*, pp. 250–251.
[204] For the commentary to this guideline, see *ibid.*, pp. 252–253.
[205] For the commentary to this guideline, see *ibid.*, pp. 253–256.

2.9.2 Opposition to an interpretative declaration[206]

"Opposition" to an interpretative declaration means a unilateral statement made by a State or an international organization in reaction to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization rejects the interpretation formulated in the interpretative declaration, including by formulating an alternative interpretation.

2.9.3 Recharacterization of an interpretative declaration[207]

"Recharacterization" of an interpretative declaration means a unilateral statement made by a State or an international organization in reaction to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization treats the declaration as a reservation.

A State or an international organization that intends to treat an interpretative declaration as a reservation should take into account draft guidelines 1.3 to 1.3.3.

2.9.4 Freedom to formulate approval, opposition or recharacterization[208]

An approval, opposition or recharacterization in respect of an interpretative declaration may be formulated at any time by any contracting State or any contracting international organization and by any State or any international organization that is entitled to become a party to the treaty.

2.9.5 Form of approval, opposition and recharacterization[209]

An approval, opposition or recharacterization in respect of an interpretative declaration should preferably be formulated in writing.

2.9.6 Statement of reasons for approval, opposition and recharacterization[210]

An approval, opposition or recharacterization in respect of an interpretative declaration should, to the extent possible, indicate the reasons why it is being made.

2.9.7 Formulation and communication of approval, opposition or recharacterization[211]

An approval, opposition or recharacterization in respect of an interpretative declaration should, *mutatis mutandis*, be formulated and communicated in accordance with guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7.

2.9.8 Non-presumption of approval or opposition[212]

An approval of, or an opposition to, an interpretative declaration shall not be presumed.

Notwithstanding guidelines 2.9.1 and 2.9.2, an approval of an interpretative declaration or an opposition thereto may be inferred, in exceptional cases, from the conduct of the States or international organizations concerned, taking into account all relevant circumstances.

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[206] For the commentary to this guideline, see *ibid.*, pp. 256–263.

[207] For the commentary to this guideline, see *ibid.*, pp. 263–268.

[208] For the commentary to this guideline, see *ibid.*, p. 269.

[209] For the commentary to this guideline, see *ibid.*, pp. 270–272.

[210] For the commentary to this guideline, see *ibid.*, pp. 272–273.

[211] For the commentary to this guideline, see *ibid.*, p. 274.

[212] For the commentary to this guideline, see *ibid.*, pp. 275–279.

2.9.9 Silence with respect to an interpretative declaration[213]

An approval of an interpretative declaration shall not be inferred from the mere silence of a State or an international organization.

In exceptional cases, the silence of a State or an international organization may be relevant to determining whether, through its conduct and taking account of the circumstances, it has approved an interpretative declaration.

[2.9.10 Reactions to conditional interpretative declarations[214]

Guidelines 2.6.1 to 2.8.12 shall apply, *mutatis mutandis*, to reactions of States and international organizations to conditional interpretative declarations.]

3. Permissibility of reservations and interpretative declarations

3.1 Permissible reservations[215]

A State or an international organization may, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) The reservation is prohibited by the treaty;

(b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) In cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

3.1.1 Reservations expressly prohibited by the treaty[216]

A reservation is expressly prohibited by the treaty if it contains a particular provision:

(a) Prohibiting all reservations;

(b) Prohibiting reservations to specified provisions and a reservation in question is formulated to one of such provisions; or

(c) Prohibiting certain categories of reservations and a reservation in question falls within one of such categories.

3.1.2 Definition of specified reservations[217]

For the purposes of guideline 3.1, the expression "specified reservations" means reservations that are expressly envisaged in the treaty to certain provisions of the treaty or to the treaty as a whole with respect to certain specific aspects.

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[213] For the commentary to this guideline, see *ibid.*, pp. 279–280.

[214] For the commentary to this guideline, see *ibid.*, pp. 281–283.

[215] For the commentary to this guideline, see *ibid.*, *Sixty-first Session, Supplement No. 10* (A/61/10), pp. 327–333.

[216] For the commentary to this guideline, see *ibid.*, pp. 333–340.

[217] For the commentary to this guideline, see *ibid.*, pp. 340–350.

3.1.3 Permissibility of reservations not prohibited by the treaty[218]

Where the treaty prohibits the formulation of certain reservations, a reservation which is not prohibited by the treaty may be formulated by a State or an international organization only if it is not incompatible with the object and purpose of the treaty.

3.1.4 Permissibility of specified reservations[219]

Where the treaty envisages the formulation of specified reservations without defining their content, a reservation may be formulated by a State or an international organization only if it is not incompatible with the object and purpose of the treaty.

3.1.5 Incompatibility of a reservation with the object and purpose of the treaty[220]

A reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general thrust, in such a way that the reservation impairs the *raison d'être* of the treaty.

3.1.6 Determination of the object and purpose of the treaty[221]

The object and purpose of the treaty is to be determined in good faith, taking account of the terms of the treaty in their context. Recourse may also be had in particular to the title of the treaty, the preparatory work of the treaty and the circumstances of its conclusion and, where appropriate, the subsequent practice agreed upon by the parties.

3.1.7 Vague or general reservations[222]

A reservation shall be worded in such a way as to allow its scope to be determined, in order to assess in particular its compatibility with the object and purpose of the treaty.

3.1.8 Reservations to a provision reflecting a customary norm[223]

1. The fact that a treaty provision reflects a customary norm is a pertinent factor in assessing the validity of a reservation although it does not in itself constitute an obstacle to the formulation of the reservation to that provision.

2. A reservation to a treaty provision which reflects a customary norm does not affect the binding nature of that customary norm which shall continue to apply as such between the reserving State or international organization and other States or international organizations which are bound by that norm.

3.1.9 Reservations contrary to a rule of *jus cogens*[224]

A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law.

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[218] For the commentary to this guideline, see *ibid.*, pp. 350–354.

[219] For the commentary to this guideline, see *ibid.*, pp. 354–356.

[220] For the commentary to this guideline, see *ibid.*, *Sixty-second Session, Supplement No. 10* (A/62/10), pp. 66–77.

[221] For the commentary to this guideline, see *ibid.*, pp. 77–82.

[222] For the commentary to this guideline, see *ibid.*, pp. 82–88.

[223] For the commentary to this guideline, see *ibid.*, pp. 89–98.

[224] For the commentary to this guideline, see *ibid.*, pp. 99–104.

3.1.10 Reservations to provisions relating to non-derogable rights[225]

A State or an international organization may not formulate a reservation to a treaty provision relating to non-derogable rights unless the reservation in question is compatible with the essential rights and obligations arising out of that treaty. In assessing that compatibility, account shall be taken of the importance which the parties have conferred upon the rights at issue by making them non-derogable.

3.1.11 Reservations relating to internal law[226]

A reservation by which a State or an international organization purports to exclude or to modify the legal effect of certain provisions of a treaty or of the treaty as a whole in order to preserve the integrity of specific norms of the internal law of that State or rules of that organization may be formulated only insofar as it is compatible with the object and purpose of the treaty.

3.1.12 Reservations to general human rights treaties[227]

To assess the compatibility of a reservation with the object and purpose of a general treaty for the protection of human rights, account shall be taken of the indivisibility, interdependence and interrelatedness of the rights set out in the treaty as well as the importance that the right or provision which is the subject of the reservation has within the general thrust of the treaty, and the gravity of the impact the reservation has upon it.

3.1.13 Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty[228]

A reservation to a treaty provision concerning dispute settlement or the monitoring of the implementation of the treaty is not, in itself, incompatible with the object and purpose of the treaty, unless:

(i) The reservation purports to exclude or modify the legal effect of a provision of the treaty essential to its *raison d'être*; or

(ii) The reservation has the effect of excluding the reserving State or international organization from a dispute settlement or treaty implementation monitoring mechanism with respect to a treaty provision that it has previously accepted, if the very purpose of the treaty is to put such a mechanism into effect.

3.2 Assessment of the permissibility of reservation[229]

The following may assess, within their respective competences, the permissibility of reservations to a treaty formulated by a State or an international organization:

- Contracting States or contracting organizations
- Dispute settlement bodies
- Treaty monitoring bodies

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[225] For the commentary to this guideline, see *ibid.*, pp. 104–109.

[226] For the commentary to this guideline, see *ibid.*, pp. 109–113.

[227] For the commentary to this guideline, see *ibid.*, pp. 113–116.

[228] For the commentary to this guideline, see *ibid.*, pp. 117–121.

[229] For the commentary to this guideline, see *ibid.*, *Sixty-fourth Session, Supplement No. 10* (A/64/10), pp. 284–296.

3.2.1 Competence of the treaty monitoring bodies to assess the permissibility of reservations[230]

A treaty monitoring body may, for the purpose of discharging the functions entrusted to it, assess the permissibility of reservations formulated by a State or an international organization.

The conclusions formulated by such a body in the exercise of this competence shall have the same legal effect as that deriving from the performance of its monitoring role.

3.2.2 Specification of the competence of treaty monitoring bodies to assess the permissibility of reservations[231]

When providing bodies with the competence to monitor the application of treaties, States or international organizations should specify, where appropriate, the nature and the limits of the competence of such bodies to assess the permissibility of reservations. For the existing monitoring bodies, measures could be adopted to the same ends.

3.2.3 Cooperation of States and international organizations with treaty monitoring bodies[232]

States and international organizations that have formulated reservations to a treaty establishing a treaty monitoring body are required to cooperate with that body and should give full consideration to that body's assessment of the permissibility of the reservations that they have formulated.

3.2.4 Bodies competent to assess the permissibility of reservations in the event of the establishment of a treaty monitoring body[233]

When a treaty establishes a treaty monitoring body, the competence of that body is without prejudice to the competence of the contracting States or contracting international organizations to assess the permissibility of reservations to that treaty, or to that of dispute settlement bodies competent to interpret or apply the treaty.

3.2.5 Competence of dispute settlement bodies to assess the permissibility of reservations[234]

When a dispute settlement body is competent to adopt decisions binding upon the parties to a dispute, and the assessment of the permissibility of a reservation is necessary for the discharge of such competence by that body, such assessment is, as an element of the decision, legally binding upon the parties.

3.3 Consequences of the non-permissibility of a reservation[235]

A reservation formulated in spite of a prohibition arising from the provisions of the treaty or in spite of its incompatibility with the object and the purpose of the treaty is impermissible, without there being any need to distinguish between the consequences of these grounds for non-permissibility.

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[230] For the commentary to this guideline, see *ibid.*, pp. 296–297.

[231] For the commentary to this guideline, see *ibid.*, pp. 298–299.

[232] For the commentary to this guideline, see *ibid.*, pp. 299–301.

[233] For the commentary to this guideline, see *ibid.*, p. 301.

[234] For the commentary to this guideline, see *ibid.*, p. 302.

[235] For the commentary to this guideline, see *ibid.*, pp. 302–308.

3.3.1 Non-permissibility of reservations and international responsibility[236]

The formulation of an impermissible reservation produces its consequences pursuant to the law of treaties and does not, in itself, engage the international responsibility of the State or international organization which has formulated it.

3.3.2 [3.3.3] Effect of individual acceptance of an impermissible reservation[237]

Acceptance of an impermissible reservation by a contracting State or by a contracting organization shall not cure the nullity of the reservation.

3.3.3 [3.3.4] Effect of collective acceptance of an impermissible reservation[238]

A reservation that is prohibited by the treaty or which is incompatible with its object and purpose shall be deemed permissible if no contracting State or contracting organization objects to it after having been expressly informed thereof by the depositary at the request of a contracting State or a contracting organization.

3.4 Permissibility of reactions to reservations[239]

3.4.1 Permissibility of the acceptance of a reservation[240]

The express acceptance of an impermissible reservation is itself impermissible.

3.4.2 Permissibility of an objection to a reservation[241]

An objection to a reservation by which a State or an international organization purports to exclude in its relations with the author of the reservation the application of provisions of the treaty to which the reservation does not relate is only permissible if:

(1) The additional provisions thus excluded have a sufficient link with the provisions to which the reservation relates; and

(2) The objection would not defeat the object and purpose of the treaty in the relations between the author of the reservation and the author of the objection.

3.5 Permissibility of an interpretative declaration[242]

A State or an international organization may formulate an interpretative declaration unless the interpretative declaration is prohibited by the treaty or is incompatible with a peremptory norm of general international law.

3.5.1 Permissibility of an interpretative declaration which is in fact a reservation[243]

If a unilateral statement which purports to be an interpretative declaration is in fact a reservation, its permissibility must be assessed in accordance with the provisions of guidelines 3.1 to 3.1.13.

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[236] For the commentary to this guideline, see *ibid.*, pp. 309-311.

[237] For the commentary to this guideline, see sect. C.2 below.

[238] For the commentary to this guideline, see sect. C.2 below.

[239] For the commentary, see sect. C.2 below.

[240] For the commentary to this guideline, see sect. C.2 below.

[241] For the commentary to this guideline, see sect. C.2 below.

[242] For the commentary to this guideline, see sect. C.2 below.

[243] For the commentary to this guideline, see sect. C.2 below.

[3.5.2 Conditions for the permissibility of a conditional interpretative declaration[244]

The permissibility of a conditional interpretative declaration must be assessed in accordance with the provisions of guidelines 3.1 to 3.1.13.]

[3.5.3 Competence to assess the permissibility of a conditional interpretative declaration[245]

The provisions of guidelines 3.2 to 3.2.4 apply, *mutatis mutandis*, to conditional interpretative declarations.]

3.6. Permissibility of reactions to interpretative declarations[246]

Subject to the provisions of guidelines 3.6.1 and 3.6.2, an approval of, opposition to, or recharacterization of, an interpretative declaration shall not be subject to any conditions for permissibility.

3.6.1 Permissibility of approvals of interpretative declarations[247]

An approval of an impermissible interpretative declaration is itself impermissible.

3.6.2 Permissibility of oppositions to interpretative declarations[248]

An opposition to an interpretative declaration is impermissible to the extent that it does not comply with the conditions for permissibility of an interpretative declaration set forth in guideline 3.5.

4. Legal effects of reservations and interpretative declarations[249]

4.1 Establishment of a reservation with regard to another State or organization[250]

A reservation formulated by a State or an international organization is established with regard to a contracting State or a contracting organization if it is permissible and was formulated in accordance with the required form and procedures, and if that contracting State or contracting organization has accepted it.

4.1.1 Establishment of a reservation expressly authorized by a treaty[251]

A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States and contracting organizations, unless the treaty so provides.

A reservation expressly authorized by a treaty is established with regard to the other contracting States and contracting organizations if it was formulated in accordance with the required form and procedures.

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[244] For the commentary to this guideline, see sect. C.2 below.

[245] For the commentary to this guideline, see sect. C.2 below.

[246] For the commentary to this guideline, see sect. C.2 below.

[247] For the commentary to this guideline, see sect. C.2 below.

[248] For the commentary to this guideline, see sect. C.2 below.

[249] For the commentary, see sect. C.2 below.

[250] For the commentary to this guideline, see sect. C.2 below.

[251] For the commentary to this guideline, see sect. C.2 below.

4.1.2 Establishment of a reservation to a treaty which has to be applied in its entirety[252]

A reservation to a treaty in respect of which it appears, from the limited number of negotiating States and organizations and the object and purpose of the treaty, that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty is established with regard to the other contracting States and contracting organizations if it is permissible and was formulated in accordance with the required form and procedures, and if all the contracting States and contracting organizations have accepted it.

4.1.3 Establishment of a reservation to a constituent instrument of an international organization[253]

A reservation to a treaty which is a constituent instrument of an international organization is established with regard to the other contracting States and contracting organizations if it is permissible and was formulated in accordance with the required form and procedures, and if it has been accepted in conformity with guidelines 2.8.7 to 2.8.10.

4.2 Effects of an established reservation[254]

4.2.1 Status of the author of an established reservation[255]

As soon as a reservation is established in accordance with guidelines 4.1 to 4.1.3, its author becomes a contracting State or contracting organization to the treaty.

4.2.2 Effect of the establishment of a reservation on the entry into force of a treaty[256]

1. When a treaty has not yet entered into force, the author of a reservation shall be included in the number of contracting States and contracting organizations required for the treaty to enter into force once the reservation is established.

2. The author of the reservation may however be included at an earlier date in the number of contracting States and contracting organizations required for the treaty to enter into force, if no contracting State or contracting organization is opposed in a particular case.

4.2.3 Effect of the establishment of a reservation on the status of the author as a party to the treaty[257]

The establishment of a reservation constitutes its author a party to the treaty in relation to contracting States and contracting organizations in respect of which the reservation is established if or when the treaty is in force.

4.2.4 Effect of an established reservation on treaty relations[258]

1. A reservation established with regard to another party excludes or modifies for the reserving State or international organization in its relations with that other party the legal effect of the provisions of the treaty to which the reservation relates or of the treaty as a whole with respect to certain specific aspects, to the extent of the reservation.

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[252] For the commentary to this guideline, see sect. C.2 below.

[253] For the commentary to this guideline, see sect. C.2 below.

[254] For the commentary, see sect. C.2 below.

[255] For the commentary to this guideline, see sect. C.2 below.

[256] For the commentary to this guideline, see sect. C.2 below.

[257] For the commentary to this guideline, see sect. C.2 below.

[258] For the commentary to this guideline, see sect. C.2 below.

2. To the extent that an established reservation excludes the legal effect of certain provisions of a treaty, the author of that reservation has neither rights nor obligations under those provisions in its relations with the other parties with regard to which the reservation is established. Those other parties shall likewise have neither rights nor obligations under those provisions in their relations with the author of the reservation.

3. To the extent that an established reservation modifies the legal effect of certain provisions of a treaty, the author of that reservation has rights and obligations under those provisions, as modified by the reservation, in its relations with the other parties with regard to which the reservation is established. Those other parties shall have rights and obligations under those provisions, as modified by the reservation, in their relations with the author of the reservation.

4.2.5 Non-reciprocal application of obligations to which a reservation relates[259]

Insofar as the obligations under the provisions to which the reservation relates are not subject to reciprocal application in view of the nature of the obligations or the object and purpose of the treaty, the content of the obligations of the parties other than the author of the reservation remains unaffected. The content of the obligations of those parties likewise remains unaffected when reciprocal application is not possible because of the content of the reservation.

4.3 Effect of an objection to a valid reservation[260]

Unless the reservation has been established with regard to an objecting State or organization, the formulation of an objection to a valid reservation precludes the reservation from having its intended effects as against that State or international organization.

4.3.1 Effect of an objection on the entry into force of the treaty as between the author of the objection and the author of a reservation[261]

An objection by a contracting State or by a contracting organization to a valid reservation does not preclude the entry into force of the treaty as between the objecting State or organization and the reserving State or organization, except in the case mentioned in guideline 4.3.4.

4.3.2 Entry into force of the treaty between the author of a reservation and the author of an objection[262]

The treaty enters into force between the author of a valid reservation and the objecting contracting State or contracting organization as soon as the author of the reservation has become a contracting State or a contracting organization in accordance with guideline 4.2.1 and the treaty has entered into force.

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[259] For the commentary to this guideline, see sect. C.2 below.

[260] For the commentary to this guideline, see sect. C.2 below.

[261] For the commentary to this guideline, see sect. C.2 below.

[262] For the commentary to this guideline, see sect. C.2 below.

4.3.3 Non-entry into force of the treaty for the author of a reservation when unanimous acceptance is required[263]

If unanimous acceptance is required for the establishment of the reservation, any objection by a contracting State or by a contracting organization to a valid reservation precludes the entry into force of the treaty for the reserving State or organization.

4.3.4 Non-entry into force of the treaty as between the author of a reservation and the author of an objection with maximum effect[264]

An objection by a contracting State or by a contracting organization to a valid reservation precludes the entry into force of the treaty as between the objecting State or organization and the reserving State or organization, if the objecting State or organization has definitely expressed an intention to that effect in accordance with guideline 2.6.8.

4.3.5 Effect of an objection on treaty relations[265]

1. When a State or an international organization objecting to a valid reservation has not opposed the entry into force of the treaty between itself and the reserving State or organization, the provisions to which the reservation relates do not apply as between the author of the reservation and the objecting State or organization, to the extent of the reservation.

2. To the extent that a valid reservation purports to exclude the legal effect of certain provisions of the treaty, when a contracting State or a contracting organization has raised an objection to it but has not opposed the entry into force of the treaty between itself and the author of the reservation, the objecting State or organization and the author of the reservation are not bound, in their treaty relations, by the provisions to which the reservation relates.

3. To the extent that a valid reservation purports to modify the legal effect of certain provisions of the treaty, when a contracting State or a contracting organization has raised an objection to it but has not opposed the entry into force of the treaty between itself and the author of the reservation, the objecting State or organization and the author of the reservation are not bound, in their treaty relations, by the provisions of the treaty as intended to be modified by the reservation.

4. All the provisions of the treaty other than those to which the reservation relates shall remain applicable as between the reserving State or organization and the objecting State or organization.

4.3.6 Effect of an objection on provisions other than those to which the reservation relates[266]

1. A provision of the treaty to which the reservation does not relate, but which has a sufficient link with the provisions to which the reservation does relate, is not applicable in the treaty relations between the author of the reservation and the author of an objection formulated in accordance with guideline 3.4.2.

2. The reserving State or organization may, within a period of 12 months following the notification of such an objection, oppose the entry into force of the treaty between itself and the objecting State or organization. In the absence of such opposition, the treaty shall apply

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[263] For the commentary to this guideline, see sect. C.2 below.

[264] For the commentary to this guideline, see sect. C.2 below.

[265] For the commentary to this guideline, see sect. C.2 below.

[266] For the commentary to this guideline, see sect. C.2 below.

between the author of the reservation and the author of the objection to the extent provided by the reservation and the objection.

4.3.7 Right of the author of a valid reservation not to be compelled to comply with the treaty without the benefit of its reservation[267]

The author of a reservation which is permissible and which has been formulated in accordance with the required form and procedures cannot be compelled to comply with the provisions of the treaty without the benefit of its reservation.

4.4 Effect of a reservation on rights and obligations outside of the treaty

4.4.1 Absence of effect on rights and obligations under another treaty[268]

A reservation, acceptance of it or objection to it neither modifies nor excludes the respective rights and obligations of their authors under another treaty to which they are parties.

4.4.2 Absence of effect on rights and obligations under customary international law[269]

A reservation to a treaty provision which reflects a rule of customary international law does not of itself affect the rights and obligations under that rule, which shall continue to apply as such between the reserving State or organization and other States or international organizations which are bound by that rule.

4.4.3 Absence of effect on a peremptory norm of general international law (*jus cogens*)[270]

A reservation to a treaty provision which reflects a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of that norm, which shall continue to apply as such between the reserving State or organization and other States or international organizations.

4.5 Consequences of an invalid reservation[271]

4.5.1 [3.3.2, later 4.5.1 and 4.5.2] Nullity of an invalid reservation[272]

A reservation that does not meet the conditions of formal validity and permissibility set out in Parts 2 and 3 of the Guide to Practice is null and void, and therefore devoid of legal effect.

4.5.2 [4.5.3] Status of the author of an invalid reservation in relation to the treaty[273]

When an invalid reservation has been formulated, the reserving State or the reserving international organization is considered a contracting State or a contracting organization or, as the case may be, a party to the treaty without the benefit of the reservation, unless a contrary intention of the said State or organization can be identified.

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[267] For the commentary to this guideline, see sect. C.2 below.

[268] For the commentary to this guideline, see sect. C.2 below.

[269] For the commentary to this guideline, see sect. C.2 below.

[270] For the commentary to this guideline, see sect. C.2 below.

[271] For the commentary, see sect. C.2 below.

[272] For the commentary to this guideline, see sect. C.2 below.

[273] For the commentary to this guideline, see sect. C.2 below.

The intention of the author of the reservation shall be identified by taking into consideration all factors that may be relevant to that end, including:

- The wording of the reservation
- Statements made by the author of the reservation when negotiating, signing or ratifying the treaty, or otherwise expressing its consent to be bound by the treaty
- Subsequent conduct of the author of the reservation
- Reactions of other contracting States and contracting organizations
- The provision or provisions to which the reservation relates, and
- The object and purpose of the treaty

4.5.3 [4.5.4] Reactions to an invalid reservation[274]

The nullity of an invalid reservation does not depend on the objection or the acceptance by a contracting State or a contracting organization.

Nevertheless, a State or an international organization which considers that the reservation is invalid should, if it deems it appropriate, formulate a reasoned objection as soon as possible.

4.6 Absence of effect of a reservation on the relations between the other parties to the treaty[275]

A reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

4.7 Effect of an interpretative declaration[276]

4.7.1 [4.7 and 4.7.1] Clarification of the terms of the treaty by an interpretative declaration[277]

An interpretative declaration does not modify treaty obligations. It may only specify or clarify the meaning or scope which its author attributes to a treaty or to certain provisions thereof and may, as appropriate, constitute an element to be taken into account in interpreting the treaty in accordance with the general rule of interpretation of treaties.

In interpreting the treaty, account shall also be taken, as appropriate, of the approval of, or opposition to, the interpretative declaration, by other contracting States or contracting organizations.

4.7.2 Effect of the modification or the withdrawal of an interpretative declaration in respect of its author[278]

The modification or the withdrawal of an interpretative declaration may not produce the effects provided for in draft guideline 4.7.1 to the extent that other contracting States or contracting organizations have relied upon the initial declaration.

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[274] For the commentary to this guideline, see sect. C.2 below.

[275] For the commentary to this guideline, see sect. C.2 below.

[276] For the commentary, see sect. C.2 below.

[277] For the commentary to this guideline, see sect. C.2 below.

[278] For the commentary to this guideline, see sect. C.2 below.

4.7.3 Effect of an interpretative declaration approved by all the contracting States and contracting organizations[279]

An interpretative declaration that has been approved by all the contracting States and contracting organizations may constitute an agreement regarding the interpretation of the treaty.

5. Reservations, acceptances of and objections to reservations, and interpretative declarations in the case of succession of States[280]

5.1. Reservations and succession of States

5.1.1 [5.1] Newly independent States[281]

1. When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession, it shall be considered as maintaining any reservation to that treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates unless, when making the notification of succession, it expresses a contrary intention or formulates a reservation which relates to the same subject matter as that reservation.

2. When making a notification of succession establishing its status as a party or as a contracting State to a multilateral treaty, a newly independent State may formulate a reservation unless the reservation is one the formulation of which would be excluded by the provisions of subparagraph (a), (b) or (c) of guideline 3.1 of the Guide to Practice.

3. When a newly independent State formulates a reservation in conformity with paragraph 2, the relevant rules set out in Part 2 (Procedure) of the Guide to Practice apply in respect of that reservation.

4. For the purposes of this Part of the Guide to Practice, "newly independent State" means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible.

5.1.2 [5.2] Uniting or separation of States[282]

1. Subject to the provisions of guideline 5.1.3, a successor State which is a party to a treaty as the result of a uniting or separation of States shall be considered as maintaining any reservation to the treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates, unless it expresses its intention not to maintain one or more reservations of the predecessor State at the time of the succession.

2. A successor State which is a party to a treaty as the result of a uniting or separation of States may not formulate a new reservation.

3. When a successor State formed from a uniting or separation of States makes a notification whereby it establishes its status as a party or as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but to which the predecessor State was a contracting State, that State shall be considered as

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[279] For the commentary to this guideline, see sect. C.2 below.

[280] For the commentary, see sect. C.2 below.

[281] For the commentary to this guideline, see sect. C.2 below.

[282] For the commentary to this guideline, see sect. C.2 below.

maintaining any reservation to the treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates, unless it expresses a contrary intention when making the notification or formulates a reservation which relates to the same subject matter as that reservation. That successor State may formulate a new reservation to the treaty.

4. A successor State may formulate a reservation in accordance with paragraph 3 only if the reservation is one the formulation of which would not be excluded by the provisions of subparagraph (a), (b) or (c) of guideline 3.1 of the Guide to Practice. The relevant rules set out in Part 2 (Procedure) of the Guide to Practice apply in respect of that reservation.

5.1.3 [5.3] Irrelevance of certain reservations in cases involving a uniting of States[283]

When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of any of them continues in force in respect of the successor State, such reservations as may have been formulated by any such State which, at the date of the succession of States, was a contracting State in respect of which the treaty was not in force shall not be maintained.

5.1.4 Establishment of new reservations formulated by a successor State[284]

Part 4 of the Guide to Practice applies to new reservations formulated by a successor State in accordance with guideline 5.1.1 or 5.1.2.

5.1.5 [5.4] Maintenance of the territorial scope of reservations formulated by the predecessor State[285]

Subject to the provisions of guideline 5.1.6, a reservation considered as being maintained in conformity with guideline 5.1.1, paragraph 1, or guideline 5.1.2, paragraph 1 or 3, shall retain the territorial scope that it had at the date of the succession of States, unless the successor State expresses a contrary intention.

5.1.6 [5.5] Territorial scope of reservations in cases involving a uniting of States[286]

1. When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of only one of the States forming the successor State becomes applicable to a part of the territory of that State to which it did not apply previously, any reservation considered as being maintained by the successor State shall apply to that territory unless:

(a) the successor State expresses a contrary intention when making the notification extending the territorial scope of the treaty; or

(b) the nature or purpose of the reservation is such that the reservation cannot be extended beyond the territory to which it was applicable at the date of the succession of States.

2. When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of two or more of the uniting States becomes applicable to a part of the territory of the successor State to which it did not apply at the date of the succession of States, no reservation shall extend to that territory unless:

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[283] For the commentary to this guideline, see sect. C.2 below.

[284] For the commentary to this guideline, see sect. C.2 below.

[285] For the commentary to this guideline, see sect. C.2 below.

[286] For the commentary to this guideline, see sect. C.2 below.

(a) an identical reservation has been formulated by each of those States in respect of which the treaty was in force at the date of the succession of States;

(b) the successor State expresses a different intention when making the notification extending the territorial scope of the treaty; or

(c) a contrary intention otherwise becomes apparent from the circumstances surrounding that State's succession to the treaty.

3. A notification purporting to extend the territorial scope of reservations within the meaning of paragraph 2 (b) shall be without effect if such an extension would give rise to the application of contradictory reservations to the same territory.

4. The provisions of the foregoing paragraphs shall apply *mutatis mutandis* to reservations considered as being maintained by a successor State that is a contracting State, following a uniting of States, to a treaty which was not in force for any of the uniting States at the date of the succession of States but to which one or more of those States were contracting States at that date, when the treaty becomes applicable to a part of the territory of the successor State to which it did not apply at the date of the succession of States.

5.1.7 [5.6] Territorial scope of reservations of the successor State in cases of succession involving part of a territory[287]

When, as a result of a succession of States involving part of a territory, a treaty to which the successor State is a party or a contracting State becomes applicable to that territory, any reservation to the treaty formulated previously by that State shall also apply to that territory as from the date of the succession of States unless:

(a) the successor State expresses a contrary intention; or

(b) it appears from the reservation that its scope was limited to the territory of the successor State that was within its borders prior to the date of the succession of States, or to a specific territory.

5.1.8 [5.7] Timing of the effects of non-maintenance by a successor State of a reservation formulated by the predecessor State[288]

The non-maintenance, in conformity with guideline 5.1.1 or 5.1.2, by the successor State of a reservation formulated by the predecessor State becomes operative in relation to another contracting State or contracting organization or another State or international organization party to the treaty only when notice of it has been received by that State or international organization.

5.1.9 [5.9] Late reservations formulated by a successor State[289]

A reservation shall be considered as late if it is formulated:

(a) by a newly independent State after it has made a notification of succession to the treaty;

(b) by a successor State other than a newly independent State after it has made a notification establishing its status as a party or as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but in respect of which the predecessor State was a contracting State; or

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[287] For the commentary to this guideline, see sect. C.2 below.

[288] For the commentary to this guideline, see sect. C.2 below.

[289] For the commentary to this guideline, see sect. C.2 below.

(c) by a successor State other than a newly independent State in respect of a treaty which, following the succession of States, continues in force for that State.

5.2 Objections to reservations and succession of States

5.2.1 [5.10] Maintenance by the successor State of objections formulated by the predecessor State[290]

Subject to the provisions of guideline 5.2.2, a successor State shall be considered as maintaining any objection formulated by the predecessor State to a reservation formulated by a contracting State or contracting organization or by a State party or international organization party to a treaty unless it expresses a contrary intention at the time of the succession.

5.2.2 [5.11] Irrelevance of certain objections in cases involving a uniting of States[291]

1. When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of any of them continues in force in respect of the State so formed, such objections to a reservation as may have been formulated by any such State which, at the date of the succession of States, was a contracting State in respect of which the treaty was not in force shall not be maintained.

2. When, following a uniting of two or more States, the successor State is a party or a contracting State to a treaty to which it has maintained reservations in conformity with guideline 5.1.1 or 5.1.2, objections to a reservation made by another contracting State or a contracting organization or by a State or an international organization party to the treaty shall not be maintained if the reservation is identical or equivalent to a reservation which the successor State itself has maintained.

5.2.3 [5.12] Maintenance of objections to reservations of the predecessor State[292]

When a reservation formulated by the predecessor State is considered as being maintained by the successor State in conformity with guideline 5.1.1 or 5.1.2, any objection to that reservation formulated by another contracting State or State party or by a contracting organization or international organization party to the treaty shall be considered as being maintained in respect of the successor State.

5.2.4 [5.13] Reservations of the predecessor State to which no objections have been made[293]

When a reservation formulated by the predecessor State is considered as being maintained by the successor State in conformity with guideline 5.1.1 or 5.1.2, a contracting State or State party or a contracting organization or international organization party to the treaty that had not objected to the reservation in respect of the predecessor State may not object to it in respect of the successor State, unless:

(a) the time period for formulating an objection has not yet expired at the date of the succession of States and the objection is made within that time period; or

(b) the territorial extension of the treaty radically changes the conditions for the operation of the reservation.

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[290] For the commentary to this guideline, see sect. C.2 below.

[291] For the commentary to this guideline, see sect. C.2 below.

[292] For the commentary to this guideline, see sect. C.2 below.

[293] For the commentary to this guideline, see sect. C.2 below.

5.2.5 [5.14] Capacity of a successor State to formulate objections to reservations[294]

1. When making a notification of succession establishing its status as a party or as a contracting State to a treaty, a newly independent State may, in the conditions laid down in the relevant guidelines of the Guide to Practice, object to reservations formulated by a contracting State or State party or by a contracting organization or international organization party to the treaty, even if the predecessor State made no such objection.

2. A successor State, other than a newly independent State, shall also have the capacity provided for in paragraph 1 when making a notification establishing its status as a party or as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but in respect of which the predecessor State was a contracting State.

3. The capacity referred to in the foregoing paragraphs shall nonetheless not be recognized in the case of treaties falling under guidelines 2.8.2 and 4.1.2.

5.2.6 [5.15] Objections by a successor State other than a newly independent State in respect of which a treaty continues in force[295]

A successor State, other than a newly independent State, in respect of which a treaty continues in force following a succession of States may not formulate an objection to a reservation to which the predecessor State had not objected unless the time period for formulating an objection has not yet expired at the date of the succession of States and the objection is made within that time period.

5.3 Acceptances of reservations and succession of States

5.3.1 [5.16 *bis*] Maintenance by a newly independent State of express acceptances formulated by the predecessor State[296]

When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty, it shall be considered as maintaining any express acceptance by the predecessor State of a reservation formulated by a contracting State or by a contracting organization unless it expresses a contrary intention within 12 months of the date of the notification of succession.

5.3.2 [5.17] Maintenance by a successor State other than a newly independent State of express acceptances formulated by the predecessor State[297]

1. A successor State, other than a newly independent State, in respect of which a treaty continues in force following a succession of States shall be considered as maintaining any express acceptance by the predecessor State of a reservation formulated by a contracting State or by a contracting organization.

2. When making a notification of succession establishing its status as a contracting State or as a party to a treaty which, on the date of the succession of States, was not in force for the predecessor State but to which the predecessor State was a contracting State, a successor State other than a newly independent State shall be considered as maintaining any express acceptance by the predecessor State of a reservation formulated by a contracting

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[294] For the commentary to this guideline, see sect. C.2 below.

[295] For the commentary to this guideline, see sect. C.2 below.

[296] For the commentary to this guideline, see sect. C.2 below.

[297] For the commentary to this guideline, see sect. C.2 below.

State or by a contracting organization unless it expresses a contrary intention within 12 months of the date of the notification of succession.

5.3.3 [5.18] Timing of the effects of non-maintenance by a successor State of an express acceptance formulated by the predecessor State[298]

The non-maintenance, in conformity with guideline 5.3.1 or guideline 5.3.2, paragraph 2, by the successor State of the express acceptance by the predecessor State of a reservation formulated by a contracting State or by a contracting organization becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization.

5.4 Interpretative declarations and succession of States

5.4.1 [5.19] Interpretative declarations formulated by the predecessor State[299]

A successor State should, to the extent possible, clarify its position concerning interpretative declarations formulated by the predecessor State. In the absence of any such clarification, a successor State shall be considered as maintaining the interpretative declarations of the predecessor State.

The preceding paragraph is without prejudice to situations in which the successor State has demonstrated, by its conduct, its intention to maintain or to reject an interpretative declaration formulated by the predecessor State.

2. Text of the draft guidelines and commentaries thereto provisionally adopted by the Commission at its sixty-second session

106. The text of the draft guidelines, together with commentaries thereto, provisionally adopted by the Commission at its sixty-second session is reproduced below.

2.6.3 Freedom to formulate objections

A State or international organization may formulate an objection to a reservation irrespective of the permissibility of the reservation.

Commentary

(1) It is now well established that a State or an international organization may make an objection to a reservation formulated by another State or another international organization, irrespective of the question of the permissibility of the reservation.[300] Although that freedom is quite extensive,[301] it is not unlimited. It therefore seems preferable to speak of a "freedom" rather than a "right"[302] because this entitlement flows from the general freedom

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[298] For the commentary to this guideline, see sect. C.2 below.

[299] For the commentary to this guideline, see sect. C.2 below.

[300] As indicated in the commentary to guideline 2.6.1 (*Official Records of the General Assembly, Sixtieth session, Supplement No. 10* (A/60/10), pp. 200–201, para. (25)), this section leaves aside the possible impact of the invalidity of a reservation on the effects of its acceptance or any objection to it. That matter is addressed in section 5 of Part 4 of the Guide to Practice concerning the effects of acceptances of and objections to invalid reservations.

[301] See paras. (6) to (10) below.

[302] Similarly with regard to reservations, see the commentary to draft guideline 3.1 (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10, pp. 328 ff, paras. (2) ff). In

of States to conclude treaties. For the same reason, the Commission has preferred, despite some contrary opinions, to speak of a "freedom to formulate" rather than a "freedom to make" objections.[303]

(2) Subject to those reservations, the *travaux préparatoires* of the 1969 Vienna Convention leave no doubt as to the discretionary nature of the formulation of objections but are not very enlightening on the question of who may formulate them.[304]

(3) In its 1951 advisory opinion, the International Court of Justice made an analogy between the permissibility of objections and that of reservations. It considered that:

> "The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation."[305]

(4) Draft article 20, paragraph 2 (b), adopted on first reading by the Commission in 1962 after heated debate,[306] endorsed that position and established a link between the objection and the incompatibility of the reservation with the object and purpose of the treaty, which seemed to be the *sine qua non* for permissibility in both cases. The provision stated:

> "An objection to a reservation by a State which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the objecting and the reserving State, unless a contrary intention shall have been expressed by the objecting State."[307]

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his first report on the law of treaties, however, Waldock mentioned "the right [of any State] to object" (*Yearbook of the International Law Commission, 1962*, vol. II, p. 62). After a lengthy discussion in the Commission on the question of the connection between objections and the compatibility of a reservation with the object and purpose of the treaty (*Yearbook ... 1962*, vol. I, 651st–656th meetings, pp. 139–179; see also para. (4) below), this requirement, which was included in draft article 19, paragraph 1 (a), as proposed by the Special Rapporteur, completely disappeared in the text of draft article 18 proposed by the Drafting Committee, which combined draft articles 18 and 19. In this respect, the Special Rapporteur noted that his two drafts "had been considerably reduced in length without, however, leaving out anything of substance" (*ibid.*, vol. I, 663rd meeting, p. 223, para. 36). Neither during the debates nor in the later texts submitted to or adopted by the Commission, was the question of the "right" to make objections revisited.

[303] To be specific, there are two cases in which an objection may be formulated but does not produce its effects, the first being where the treaty itself has yet to enter into force, which goes without saying, and the second where the objecting State or international organization intends to become a party but has not yet expressed its definitive consent to be bound; see the eleventh report on reservations to treaties (A/CN.4/574), para. 83.

[304] See guideline 265 and the commentary thereto (*Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), pp. 189–193).

[305] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 29 May 1951, I.C.J. Reports 1951*, p. 24.

[306] The criterion of compatibility with the object and purpose of the treaty played a large part in the early debates on reservations (*Yearbook ... 1962*, vol. I, 651st–656th meetings). One of the leading advocates of the link between this criterion and reactions to a reservation was Mr. Rosenne, who based his arguments on the advisory opinion of the International Court of Justice (see footnote 305 above) (*Yearbook ... 1962*, vol. I, 651st meeting, para. 79).

[307] *Yearbook ... 1962*, vol. II, p. 176.

(5) In response to the comments made by the Australian, Danish and United States Governments,[308] however, the Special Rapporteur reverted to the position taken by the Commission on first reading, omitting the reference to the criterion of compatibility from his proposed draft article 19, paragraph 3 (b).[309] The opposing opinion was nonetheless supported once more by Waldock in the Commission's debates,[310] but that did not prevent the Drafting Committee from once again leaving out any reference to the compatibility criterion – without, however, providing any explanation.[311] In accordance with that position, paragraph 4 (b) of draft article 19, adopted on second reading in 1965, merely provided that "an objection by another contracting State to a reservation precludes the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is expressed by the objecting State".[312]

(6) Despite the doubts voiced by a number of delegations,[313] the Vienna Conference of 1968–1969 made no further reference to the lack of a connection between objections and the criteria of a reservation's permissibility. In response to a question raised by the Canadian representative, however, the Expert Consultant, Sir Humphrey Waldock, was particularly clear in his support for the position adopted by the Commission:

> "The second question was, where a reservation had not been expressly authorized, and at the same time was not one prohibited under article 16, paragraph (*c*), could a contracting State lodge an objection other than that of incompatibility with the object and purpose of the treaty? The answer was surely Yes. Each contracting State remained *completely free* to decide for itself, in accordance with its own interests, whether or not it would accept the reservation."[314]

(7) On this point, the Vienna regime deviates from the solution adopted by the International Court of Justice in its 1951 advisory opinion,[315] which, in this regard, is certainly outdated and no longer corresponds to current positive law.[316] A State or an

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[308] Fourth report on the law of treaties (A/CN.4/177 and Add.1), *Yearbook ... 1965*, vol. II, pp. 45–47.

[309] *Ibid*., p. 52, para. 10.

[310] *Yearbook ... 1965*, vol. I, 799th meeting, para. 65. See also Mr. Tsuruoka, *ibid*., para. 69. For an opposing view, see Mr. Tunkin, *ibid*., para. 37.

[311] See *Yearbook ... 1965*, vol. I, 813th meeting, paras. 30–71 and, in particular, paras. 57–66.

[312] *Yearbook ...1965*, vol. II, p. 162.

[313] See, in particular, the United States amendment (A/CONF.39/C.1/L.127 in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference* (A/CONF.39/11/Add.2), p. 135) and the comments of the United States representative (*Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968. Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11), Twenty-first meeting, para. 11). See also the critical comments made by Japan (*ibid*., Twenty-first meeting, para. 29), Philippines (*ibid*., para. 58), United Kingdom (*ibid*., para. 74), Switzerland (*ibid*., para. 41), Sweden (*ibid*., Twenty-second meeting, para. 32) and Australia (*ibid*, para. 49).

[314] *Summary records* (A/CONF.39/11), cited in footnote 313 above, Twenty-fifth meeting, para. 3 (italics added).

[315] See para. (3) above. See also Massimo Coccia, "Reservations to multilateral treaties on human rights", *California Western International Law Journal*, 1985, No. 1, pp. 8–9; Richard W. Edwards, Jr., "Reservations to treaties", *Michigan Journal of International Law*, 1989, No. 2, p. 397; Liesbeth Lijnzaad, *Reservations to UN-Human Rights Treaties. Ratify and Ruin?* (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1995), p. 51; Karl Zemanek, "Some unresolved questions concerning reservations in the Vienna Convention on the Law of Treaties", *Études en droit international en l'honneur du Juge Manfred Lachs* (The Hague/Boston/Lancaster: Martinus Nijhoff Publishers, 1984), p. 333.

[316] It is also unlikely that it reflected the state of positive law in 1951. No one seems to have ever claimed

international organization has the right to formulate an objection both to a reservation that does not meet the criteria for permissibility and to a reservation that it deems to be unacceptable "in accordance with its own interests", even if it is permissible. In other words, States and international organizations are free to object for any reason whatsoever and that reason may or may not have to do with the impermissibility of the reservation.[317]

(8) This solution is based on the principle of consent, which underlies the reservations regime and indeed all treaty law, as the Court recalled in its 1951 advisory opinion:

> "It is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto."[318]

(9) A State (or an international organization) is, therefore, never bound by treaty obligations[319] against its will. A State that formulates a reservation is simply proposing a modification of the treaty relations envisaged by the treaty.[320] Conversely, no State is obliged to accept those modifications – except for those resulting from reservations expressly authorized by the treaty, provided, of course, that they are not contrary to the object and purpose of the treaty.[321] Limiting the right to formulate objections to reservations that are contrary to one of the criteria for permissibility established in article 19 would not only violate the sovereign right to accept or refuse treaty obligations;[322] it would also have the effect of establishing an actual right to make reservations. Such a right, which definitely does not exist in an absolute sense, would contravene the very principle of the sovereign equality of States, since it would allow the reserving State (or international organization) to

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that the freedom to formulate objections in the context of the system of unanimity was subject to the reservation being contrary to the object and purpose of the treaty.

[317] Subject, of course, to the general principles of law which may limit the exercise of the discretionary power of States at the international level and the principle prohibiting abuse of rights.

[318] Opinion cited in footnote 305 above, p. 21. The dissenting judges also stressed this principle in their joint opinion: "The consent of the parties is the basis of treaty obligations. The law governing reservations is only a particular application of this fundamental principle, whether the consent of the parties to a reservation is given in advance of the proposal of the reservation or at the same time or later." (*ibid.*, pp. 31–32). See also the famous dictum of the Permanent Court of International Justice in the case of the *S.S. "Lotus"*: "The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these coexisting independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed." (Judgment of 7 September 1927, *P.C.I.J.*, Series A, No. 10, p. 18). See also A/CN.4/477/Add.1, paras. 97 and 99.

[319] This clearly does not mean that States are not bound by legal obligations emanating from other sources.

[320] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), pp. 330–331, para. (6) of the commentary to guideline 3.1.

[321] Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (The Hague: T.M.C. Asser Institut, 1988), p. 121; Christian Tomuschat, "Admissibility and legal effects of reservations to multilateral treaties", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 27 (1967), p. 466.

[322] Christian Tomuschat, *ibid.*

impose its will unilaterally on the other contracting parties.[323] In practice, this would render the mechanism of acceptances and objections meaningless.[324]

(10) It is therefore indisputable that States and international organizations have discretionary freedom to formulate objections to reservations. That is clear from guideline 2.6.1, which defines "objection" in terms of the intent of its author, irrespective of the purpose or permissibility of the reservation to which the objection relates. It follows that the author may exercise that freedom regardless of the permissibility of the reservation; in other words, it may make an objection for any reason, perhaps simply for political reasons or reasons of expediency, without being obliged to explain its reasons[325] – provided, of course, that the objection itself is not contrary to one of the criteria for permissibility.[326]

(11) However, "discretionary" does not mean "arbitrary"[327] and, even though this freedom undoubtedly stems from the power of a party to exercise its own judgement, it is not absolute. Above all, it must be exercised within the limits arising from the procedural and formal constraints that are developed and set out in detail in the guidelines that follow in this section of the Guide to Practice. Thus, for example, it should be emphasized at the outset that a State or international organization that has accepted a reservation no longer has the option of subsequently formulating an objection to the same reservation. This rule derives implicitly from the presumption of acceptance of reservations established in article 20, paragraph 5, of the Vienna Conventions, a presumption spelled out in guideline 2.8.1, which concerns the procedure for acceptances. Moreover, guideline 2.8.12 expressly enunciates the final nature of acceptance.[328]

(12) The absence of a link between the permissibility of a reservation and the objection does not, however, fully resolve the question of the permissibility of an objection. It goes without saying that the freedom to formulate an objection must be exercised in accordance with the provisions of the Guide to Practice – a point so self-evident that the Commission did not think it was worthwhile to mention it in the text of guideline 2.6.3.

(13) The wording retained also leaves open the question of whether the permissibility of an objection may be challenged on the grounds that it is contrary to a norm of *jus cogens* or another general principle of international law, such as the principle of good faith or the principle of non-discrimination. Some Commission members are of the view that it could, whereas others consider the hypothesis inconceivable, since an objection merely purports to neutralize the effects of a reservation and thus, in the case of an objection "with maximum effect" (envisaged in article 20, paragraph 4 (b) of the Vienna Conventions), to prevent the treaty from entering into force as between the author of the objection and the author of the

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[323] See, in this regard, the ninth of the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, adopted by the International Law Commission at its fifty-eighth session (*Official Records of the General Assembly, Sixty-first session, Supplement No. 10* (A/61/10), p. 379.

[324] See Daniel Müller, commentary to article 20, (1969) in Olivier Corten and Pierre Klein (eds.), *Les Conventions de Vienne sur le droit des traités: Commentaire article par article* (Brussels: Bruylant, 2008), p. 837, para. 74. See also the statement made by Mr. Pal at the 653rd meeting of the International Law Commission (*Yearbook ... 1962*, vol. I, p. 153, para. 5).

[325] In this regard, however, see guideline 2.6.10 and the commentary thereto (*Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), pp. 203–206).

[326] See guideline 3.4.2 and the commentary thereto in sect. C.2 below.

[327] See, in particular, Stevan Jovanovic, *Restriction des compétences discrétionnaires des États en droit international* (Paris: Pedone, 1988), p. 88 ff, pp. 90–93; see also Judgement No. 191 of the International Labour Organization Administrative Tribunal in the case of *Ballo v. UNESCO*.

[328] For the text of that guideline and the commentary thereto, see *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), pp. 252–253.

reservation, or, in the case of a simple objection, to prevent the application of the provisions of the treaty to which the reservation relates as between the States or international organizations in question – the implication being, in both cases, that general international law would then apply.

2.6.4 Freedom to oppose the entry into force of the treaty *vis-à-vis* the author of the reservation

A State or international organization that formulates an objection to a reservation may oppose the entry into force of the treaty as between itself and the author of the reservation.

Commentary

(1) The freedom to make objections irrespective of the permissibility (or impermissibility) of the reservation, as set out in guideline 2.6.3, also encompasses the freedom to oppose the entry into force of the treaty as between the reserving State or international organization, on the one hand, and the author of the objection, on the other. This follows from article 20, paragraph 4 (b), and article 21, paragraph 3, of the Vienna Conventions, which specify the effects of an objection.

(2) Arriving at those provisions, in particular article 20, paragraph 4 (b), of the 1969 Convention, proved difficult. The Commission's early special rapporteurs, staunch supporters of the system of unanimity, had little interest in objections, the effects of which were, in their view, purely mechanical:[329] it seemed self-evident to them that an objection prevented the reserving State from becoming a party to the treaty.[330] Even though he came to support a more flexible system, Sir Humphrey Waldock still adhered to that view in 1962, as was demonstrated by the draft article 19, paragraph 4 (c), presented in his first report on the law of treaties, which stated that "the objections shall preclude the entry into force of the treaty as between the objecting and the reserving States".[331]

(3) The members of the Commission,[332] including the Special Rapporteur,[333] were, however, inclined to abandon that categorical approach in favour of a simple presumption in order to bring the wording of this provision more into line with the 1951 advisory opinion of the International Court of Justice, which stated:

> "As no State can be bound by a reservation to which it has not consented, it necessarily follows that each State objecting to it will or will not, on the basis of its individual appraisal within the limits of the criterion of the object and purpose stated above, consider the reserving State to be a party to the Convention."[334]

(4) Strictly aligning themselves with this position, the members of the Commission introduced a simple presumption in favour of the non-entry into force of the treaty as between the reserving State and the objecting State and at the same time, at that early stage, limited the possibility of opposing the treaty's entry into force to cases where the

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[329] See guideline 4.3.1 and the commentary thereto in sect. C.2 below.

[330] Paul Reuter, *Introduction au droit des traités*, 2nd ed. (Paris: Presse Universitaire de France, 1985), p. 75, para. 132.

[331] *Yearbook ... 1962*, vol. II., p. 62.

[332] See, in particular, Mr. Tunkin (*Yearbook ... 1962*, vol. I, 653rd meeting, p. 156, para. 26, and 654th meeting, pp. 161–162, para. 11), Mr. Rosenne (*ibid.*, 653rd meeting, pp. 156–157, para. 30), Mr. Jiménez de Aréchaga (*ibid.*, p. 18, para. 48), Mr. de Luna (*ibid.*, p. 160, para. 66) and Mr. Yasseen (*ibid.*, 654th meeting, p. 161, para. 6).

[333] *Ibid.*, 654th meeting, pp. 162 and 163, paras. 17 and 29.

[334] Advisory opinion cited in footnote 305 above, p. 26.

reservation was contrary to the object and purpose of the treaty.[335] Draft article 20, paragraph 2 (b), adopted on first reading, therefore provided as follows:

> "An objection to a reservation by a State which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the objecting and the reserving State, unless a contrary intention shall have been expressed by the objecting State."[336]

(5) Once the possibility of making an objection is no longer linked to the criterion of compatibility with the object and purpose of the treaty,[337] the freedom of the objecting State to oppose the treaty's entry into force in its relations with the reserving State becomes unconditional. The objecting State may, therefore, exclude all treaty relations between itself and the reserving State for any reason. The wording ultimately retained by the Commission went so far as to make this effect automatic: an objection (whatever the reason) precluded the entry into force of the treaty, unless the State concerned expressed its contrary intention.[338] During the Vienna Conference, the thrust of that presumption was reversed, not without heated debate, in favour of the entry into force of the treaty as between the objecting State and the reserving State.[339]

(6) As open to criticism as this new approach may seem, the fact remains that the objecting State is still free to oppose the entry into force of the treaty in its relations with the reserving State. The reversal of the presumption simply requires the objecting State to make an express declaration to that effect, even though it remains completely free regarding its reasons for making such a declaration.

(7) In practice, States have been curiously eager to declare expressly that their objections do not prevent the treaty from entering into force *vis-à-vis* the reserving State, even though, by virtue of the presumption contained in article 20, paragraph 4 (b), of the Vienna Conventions, that would automatically be the case with regard to an objection to a

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[335] See the commentary to guideline 2.6.3, para. (4), above.

[336] *Yearbook ... 1962*, vol. II, p. 176 and p. 181, para. (23) of the commentary.

[337] On this point, see the explanation given in paras. (5) to (7) of the commentary to guideline 2.6.3 above.

[338] Draft article 17, paragraph 4 (b), adopted on second reading, provided as follows: "An objection by another contracting State to a reservation precludes the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is expressed by the objecting State" (Report of the International Law Commission on the work of its eighteenth session, *Yearbook ... 1966*, vol. II, p. 202).

[339] The question had already been raised during the discussion of the draft articles adopted on first reading by the members of the International Law Commission and by the Czechoslovak and Romanian delegations in the Sixth Committee (Sir Humphrey Waldock, fourth report (A/CN.4/177), footnote 308 above, pp. 48–49). The idea of reversing the presumption had been advocated by a number of Commission members (Mr. Tunkin (*Yearbook ... 1965*, vol. I, 799th meeting, para. 39) and Mr. Lachs (*ibid.*, 813th meeting, para. 62)). Nonetheless, the proposals made in this regard by Czechoslovakia (A/CONF.39/C.1/L.85, in *United Nations Conference on the Law of Treaties, Documents of the Conference* (A/CONF.39/11/Add.2), footnote 313 above, p. 135), Syria (A/CONF.39/C.1/L.94, *ibid.*) and the Union of Soviet Socialist Republics (A/CONF.39/C.1/L.115, *ibid.*, p. 133) were rejected by the Conference in 1968 (*Summary records* (A/CONF.39/11), footnote 313 above, Twenty-fifth meeting, paras. 35 ff.). It was only in 1969 that a new Soviet amendment in this regard (A/CONF.39/L.3, in *United Nations Conference on the Law of Treaties, Documents of the Conference* (A/CONF.39/11/Add.2), footnote 313 above, pp. 265–266) was finally adopted by 49 votes to 21, with 30 abstentions (*United Nations Conference on the Law of Treaties, Official records, Second Session, Vienna, 9 April–22 May 1969, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11/Add.1), Tenth plenary meeting, para. 79).

permissible reservation.[340] Nor is this practice linked to the reason for the objection, since States make objections "with minimum effect" (specifically stating that the treaty will enter into force in their relations with the reserving State) even to reservations that they deem incompatible with the object and purpose of the treaty.[341] There are, however, some examples of objections in which States specifically declare that their objection does prevent the treaty from entering into force in their relations with the reserving State.[342] Such cases, though rare,[343] show that States can and do make such objections when they see fit.

(8) It follows that the freedom to make an objection for any reason whatsoever also implies that the objecting State or international organization is free to oppose the entry into force of the treaty in its relations with the reserving State or organization. The author of the objection thus has considerable latitude in specifying the effect of its objection on the entry

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[340] Concerning invalid reservations, see guidelines 4.5.2 and 4.5.3.

[341] See Belgium's objections to the Egyptian and Cambodian reservations to the Vienna Convention on Diplomatic Relations (*Multilateral Treaties Deposited with the Secretary-General* (available from http://treaties.un.org/), chap. III.3) or the objections of Germany to several reservations to the same Convention (*ibid.*). It is, however, interesting to note that, even though Germany considered all the reservations in question as "incompatible with the letter and spirit of the Convention", the German Government declared for only some objections that they did not prevent the entry into force of the treaty as between Germany and the reserving States; it did not take a position on the other cases. Many examples can be found in the objections to the reservations formulated to the International Covenant on Civil and Political Rights, in particular the objections that were formulated to the reservation of the United States of America to article 6 of the Covenant by Belgium, Denmark, Finland, France, Italy, the Netherlands, Norway, Portugal, Spain and Sweden (*ibid.*, chap. IV.4). All these States considered the reservation to be incompatible with the object and purpose of the Covenant, but nonetheless did not oppose its entry into force in their relations with the United States. Only Germany remained silent regarding the entry into force of the Covenant, despite its objection to the reservation (*ibid.*). The phenomenon is not, however, limited to human rights treaties: see, for example, the objections of Austria, France, Germany and Italy to Viet Nam's reservation to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (*ibid.*, chap. VI.19) or the objections of the States members of the Council of Europe to the reservations to the International Convention for the Suppression of Terrorist Bombings of 1997 (*ibid.*, chap. XVIII.9) or to the International Convention for the Suppression of the Financing of Terrorism of 1999 (*ibid.*).

[342] See, for example, the objections of China and the Netherlands to the reservations formulated by a number of socialist States to the Convention on the Prevention and Punishment of the Crime of Genocide (*Multilateral Treaties ...*, footnote 341 above, chap. IV.1), the objections of Israel, Italy and the United Kingdom to the reservations formulated by Burundi to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 1973 (*ibid.*, chap. XVIII.7), the objections of France and Italy to the United States reservation to the Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be used for such Carriage (*ibid.*, chap. XI.B.22) or the objections of the United Kingdom to the Syrian and Vietnamese reservations and the objections of New Zealand to the Syrian reservation to the Vienna Convention on the Law of Treaties (*ibid.*, chap. XXIII.1).

[343] This is not to imply that maximum-effect objections accompanied by the declaration provided for in article 20, paragraph 4 (b), are a type of objection that is disappearing, as is suggested by Rosa Riquelme Cortado (*Las Reservas a los Tratados: Lagunas y Ambigüedades del Régimen de Viena* (Universidad de Murcia, 2004), p. 283). It has been argued that the thrust of the presumption retained at the Vienna Conference (in favour of the entry into force of the treaty) and political considerations may explain the reluctance of States to resort to maximum-effect objections (see Catherine Redgwell, "Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties", *British Yearbook of International Law*, 1993, p. 267). See, however, the explanations provided by States to the question posed by the Commission on this point, (Eleventh report on reservations to treaties (A/CN.4/574), paras. 33 to 38, in particular paragraph 37).

into force of the treaty as between itself and the author of the reservation.[344] In any case, in order to oppose the entry into force of the treaty in its relations with the author of the reservation, the author of the objection need only accompany its objection with an expression of that intention, pursuant to guideline 2.6.8,[345] without having to state the reasons for its decision. The limitations on that freedom are explained in the part of the Guide to Practice that deals with the effects of reservations.[346]

(9) As was explained in relation to guideline 2.6.3,[347] the Commission considered it unnecessary in guideline 2.6.4 to state the self-evident proviso that the freedom of the author of the objection to oppose the entry into force of the treaty as between itself and the author of the reservation must be exercised in accordance with the conditions of form and procedure set out elsewhere in the Guide to Practice.

3.3.2 [3.3.3] Effect of individual acceptance of an impermissible reservation

Acceptance of an impermissible reservation by a contracting State or by a contracting organization shall not cure the nullity of the reservation.

Commentary

(1) According to the first part of guideline 3.3 (Consequences of the non-permissibility of a reservation), "a reservation formulated in spite of a prohibition arising from the provisions of the treaty or in spite of its incompatibility with the object and the purpose of the treaty is impermissible".[348] The provision makes it clear that the impermissibility of the reservation results *ipso facto* from one of the grounds listed in article 19 of the Vienna Conventions and reproduced in guideline 3.1 of the Guide to Practice. In other words, either the prohibition (explicit or implicit) of the reservation or alternatively its incompatibility with the object and purpose of the treaty constitutes the necessary and sufficient condition for its impermissibility.

(2) Consequently, it is clear that the acceptance of a reservation by a contracting State or international organization formulated notwithstanding article 19, subparagraphs (a) and (b), cannot cure this impermissibility, which is the "objective" consequence of the prohibition of the reservation or of its incompatibility with the object and purpose of the treaty. That is what is explained in guideline 3.3.2.

(3) Waldock, in his capacity as Expert Consultant, clearly expressed his support for this solution at the Vienna Conference on the Law of Treaties when he stated that

> a contracting State could not purport, under article 17 [current article 20], to accept a reservation prohibited under article 16 [19], paragraph (a) or paragraph (b), because, by prohibiting the reservation, the contracting States would expressly have excluded such acceptance.[349]

(4) The logical consequence of the "impossibility" of accepting a reservation that is impermissible either under subparagraph (a) or (b) of article 19 (or of guideline 3.1), or under paragraph (c) — which follows exactly the same logic and which there is no reason

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[344] See also guideline 4.3.4 and the commentary thereto in sect. C.2 below.

[345] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), pp. 197–200.

[346] See in particular guidelines 3.4.2 and 4.3.6 and the commentary thereto in sect. C.2 below.

[347] See the commentary to guideline 2.6.3, para. (12), above.

[348] For the commentary to this provision, see *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), pp. 302–308.

[349] *United Nations Conference on the Law of Treaties, First Session, Summary records* (A/CONF.39/11), footnote 313 above, 25th meeting, 16 April 1968, p. 133, para. 2.

to distinguish from the other two paragraphs of the provision[350] — is that such an acceptance is devoid of legal effect.[351] It cannot "permit" the reservation, nor can it cause the reservation to produce any effect whatsoever – and certainly not the effect envisaged in article 21, paragraph 1, of the Vienna Conventions, which requires that the reservation must have been established.[352] Furthermore, if the acceptance of an impermissible reservation constituted an agreement between the author of the impermissible reservation and the State or international organization that accepted it, it would result in a modification of the treaty in relations between the two parties; that would be incompatible with article 41, paragraph 1 (b) (ii), of the Vienna Conventions, which excludes any modification of the treaty if it relates "to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole".[353] However, according to a different view, the prevailing practice shows that a State party to a treaty may consider the treaty to apply subject to the reservation in its relations with the reserving State, whether or not the reservation is regarded as invalid by other States or international organizations.

(5) Despite some views to the contrary, the Commission considers that this guideline should be included in Part 3 of the Guide to Practice relating to the permissibility of reservations and not in Part 4 concerning their consequences: it is a question of identifying not the effect of acceptance of an impermissible reservation, but rather the effect of acceptance on the permissibility of the reservation itself (an issue which arises earlier in the process than the question of the effect of reservations). Permissibility logically precedes acceptance (the Vienna Conventions also follow this logic) and draft guideline 3.3.2 relates to the permissibility of the reservation – in other words, to the fact that acceptance cannot change its impermissibility. Its aim is not to determine the effects of acceptance of a reservation by a State, but simply to establish that, if the reservation in question is impermissible, it remains impermissible despite an acceptance.

(6) Individual[354] — even express — acceptance of an impermissible reservation has no effect as such on the consequences of this nullity, which are specified in Part 4 of the Guide to Practice. The question of the consequences of acceptance in terms of the effects of the reservation is not and should not be raised; the inquiry stops at the stage of permissibility, which is not and cannot be acquired as a result of the acceptance.

(7) Guideline 3.4.1 (Permissibility of the acceptance of a reservation)[355] very clearly confirms this point of view. It provides that the express acceptance of an impermissible reservation also cannot have any effect; it, too, is impermissible. Guidelines 3.3.2 and 3.4.1 answer the question of the effect of an acceptance of an impermissible reservation: it can have no effect on either the permissibility of the reservation — apart from the special case

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[350] See the last part of guideline 3.3 (Consequences of the impermissibility of a reservation): "A reservation formulated in spite of a prohibition arising from the provisions of the treaty or in spite of its incompatibility with the object and the purpose of the treaty is impermissible, *without there being any need to distinguish between the consequences of these grounds for non-permissibility*."

[351] See below guideline 4.5.3 [4.5.4] (Reactions to an invalid reservation) and the commentary thereto.

[352] See guidelines 4.2.1 to 4.2.5 above and the commentaries thereto.

[353] In this regard, see D.W. Greig, "Reservations: Equity as a Balancing Factor?", *Australian Yearbook of International Law*, vol. 16 (1995), p. 57; or L. Sucharipa-Behrmann, "The Legal Effects of Reservations to Multilateral Treaties", *Austrian Review of International and European Law*, 1996, pp. 78–79; see however *contra* the comments made by Jiménez de Aréchaga and d'Amado during the discussions on Waldock's proposals of 1962 (*Yearbook … 1962*, vol. I, 653rd meeting, 29 May 1962, p. 158, paras. 44–45 and p. 160, para. 63).

[354] In contrast to collective acceptance which is addressed in guideline 3.3.3. The term "individual acceptance" is also used in guideline 2.8.9 to refer to the acceptance of a reservation to the constituent instrument of an international organization by a State or an international organization as opposed to acceptance by the competent body of the organization in question.

[355] Guideline 3.4.1 reads: "The express acceptance of an impermissible reservation is itself impermissible."

envisaged in guideline 3.3.3 — or, *a fortiori*, on the legal consequences of the nullity of an impermissible reservation. These are dealt with in section 4.5 of the Guide to Practice.

3.3.3 [3.3.4] Effect of collective acceptance of an impermissible reservation

A reservation that is prohibited by the treaty or which is incompatible with its object and purpose shall be deemed permissible if no contracting State or contracting organization objects to it after having been expressly informed thereof by the depositary at the request of a contracting State or a contracting organization.

Commentary

(1) The principle set out in guideline 3.3.2 must be accompanied by an important caveat: it applies only to acceptances by States and international organizations on an individual basis. While there is little doubt that an individual acceptance by a contracting State or contracting organization cannot have the effect of "permitting" an impermissible reservation or produce any other effect in relation to the reservation or the treaty, the situation is different where all the contracting States and contracting organizations expressly approve a reservation that — without this unanimous acceptance — would be impermissible, which is the scenario contemplated in guideline 3.3.3.

(2) More specifically, the situation envisaged in the present guideline is as follows: a reservation that is prohibited (explicitly or implicitly) by the treaty or which is incompatible with its object and purpose is formulated by a State or an international organization. Subsequently, another contracting State or contracting organization[356] which regards the reservation as impermissible requests the depositary to communicate this position to all the contracting States and contracting organizations but does not raise an objection. Following such notification by the depositary, if no contracting State or organization, duly alerted, objects to the reservation producing its intended effects, it is then "deemed permissible".[357]

(3) Draft article 17 (1) (b) proposed by Waldock in 1962 envisaged "the exceptional case of an attempt to formulate a reservation of a kind which is actually prohibited or excluded by the terms of the treaty";[358] he proposed that, in such case, "the prior consent of all the other interested States" is required.[359] This provision was not retained in the Commission's draft articles of 1962[360] or 1966 and does not appear in the Convention.[361]

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[356] The author of the reservation itself might well take that step if it is aware of the impermissibility of the reservation.

[357] For this term, see below para. (8) of the commentary to this guideline.

[358] First report on the law of treaties, A/CN.4/144, in *Yearbook ... 1962*, vol. II, p. 65, para. (9).

[359] See *ibid.*, p. 60, for the text of the draft article.

[360] The provision came up against opposition from Mr. Tunkin (*ibid.*, vol. I, 651st meeting, 25 May 1962, para. 19) and Mr. Castrén (*ibid.*, para. 68, and 652nd meeting, 28 May 1962, para. 30), who believed it to be superfluous, and it disappeared from the simplified draft retained by the Drafting Committee (*ibid.*, 663rd meeting, 18 June 1962, para. 3).

[361] This solution was, however, adopted in the reservation clause of the European Agreement concerning the Work of Crews of Vehicles Engaged in International Road Transport of 1 July 1970, of which article 21, para. 2 provides as follows: "If at the time of depositing its instrument of ratification or accession a State enters a reservation other than that provided for in paragraph 1 of this article, the Secretary-General of the United Nations shall communicate the reservation to the States which have previously deposited their instruments of ratification or accession and have not since denounced this Agreement. The reservation shall be deemed to be accepted if none of the said States has, within six months after such communication, expressed its opposition to acceptance of the reservation. Otherwise the reservation shall not be admitted, and, if the State which entered the reservation does not withdraw it the deposit of that State's instrument of ratification or accession shall be without effect." On the basis of this provision and in the absence of an objection from the other States parties to the Convention, the States members of the European Economic Community formulated a

(4) Silence does not solve the problem. Indeed, it can be argued that the parties always have a right to amend the treaty by general agreement *inter se* in accordance with article 39 of the Vienna Conventions and that nothing prevents them from adopting a unanimous agreement[362] to that end on the subject of reservations.[363] This possibility, which accords with the principle of consent that underpins all the law of treaties, nevertheless poses some very difficult problems. The first problem is whether the absence of objections by all the other parties within a 12-month period is equivalent to a unanimous agreement constituting an amendment to the reservation clause. At first sight, article 20, paragraph 5, of the Convention seems to answer this in the affirmative.

(5) However, after further consideration, this is not necessarily the case: silence on the part of a State party does not mean that it is taking a position as to the permissibility of the reservation; at most, it means that the reservation may be invoked against it[364] and that the State undertakes not to object to it in the future.[365] This is shown by the fact that it cannot be argued that monitoring bodies — whether the International Court of Justice, an arbitral tribunal or a human rights treaty body — are prevented from assessing the permissibility of a reservation even if no objection has been raised to it.[366]

(6) The idea underlying this draft guideline is, moreover, supported to some extent by practice. Although it is not, strictly speaking, a case of unanimous acceptance by the parties to a treaty, the neutrality reservation formulated by Switzerland upon acceding to the Covenant of the League of Nations is an example in which, despite the prohibition of reservations, the reserving State was admitted into the circle of States parties.[367] This "precedent" does not, however, help to prove the existence of a customary norm along those lines. Thus, rather than leaving a gap on an issue that could arise, the Commission

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reservation, not authorized by the Agreement, excluding the application of the agreement to certain operations. See the reservations made by the States which, at the time, were members of the Community, *Multilateral Treaties* ... footnote 341 above, chap. XI.B.21.

[362] But not an agreement between certain of the parties only; see para. (7) of the commentary to guideline 3.3.2 above.

[363] In this regard, see D.W. Greig, footnote 353 above, pp. 56–57 or L. Sucharipa-Behrman, footnote 353 above, p. 78. This is also the position of D.W. Bowett, but he considers that this possibility does not come under the law of reservations ("Reservations to Non-Restricted Multilateral Treaties", *British Yearbook of International Law*, 1976–1977, p. 84; see also C. Redgwell, footnote 343 above, p. 269). Moreover, it cannot reasonably be argued that the rules established in article 19, and in particular subparagraph (c), constitute peremptory norms of general international law from which the parties may not derogate by agreement.

[364] In this regard, see M. Coccia, footnote 315 above, p. 26; F. Horn, footnote 321 above, pp. 121–131; or Karl Zemanek, "Some Unresolved Questions concerning Reservations in the Vienna Convention on the Law of Treaties", *Essays in International Law in Honour of Judge Manfred Lachs* (The Hague: Nijhoff, 1984), pp. 331–332; see also G. Gaja "Unruly treaty reservations" *Le droit international à l'heure de sa codification. Etudes en l'honneur de Roberto Ago* (Milan: Giuffrè, 1987), vol. I, pp. 319–320. As pointed out quite rightly by Liesbeth Lijnzaad, it is not a question of acceptance *stricto sensu*, "it is the problem of inactive States whose laxity leads to the acceptance of reservations contrary to object and purpose" (*op. cit.*, footnote 315 above, p. 56).

[365] See guideline 2.8.12 and the commentary thereto, *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), pp. 252–253.

[366] See D.W. Greig, footnote 353 above, pp. 57–58. Even during the Commission's debate in 1962, Bartoš had made the point that it was almost inconceivable that the simple operation of time limits for the making of objections could mean that a clearly invalid reservation "could no longer be challenged" (*Yearbook ... 1962*, vol. I, 654th meeting, 30 May 1962, p. 163, para. 29).

[367] See Maurice H. Mendelson, "Reservations to the Constitutions of International Organizations", *British Yearbook of International Law*, vol. 45 (1971), pp. 140–141. The probative value of this example is somewhat lessened by the fact that the principle of unanimity was applied; yet the fact remains that a clearly invalid reservation succeeded in producing its effects by reason of the unanimous agreement of the parties.

should approach it from the standpoint of *lex ferenda* and progressive development of international law.

(7) That is the approach taken in guideline 3.3.3. Its wording is based in part on the solution chosen by the Commission on the subject of the late formulation of a reservation. In this case it has concluded that a reservation that is prohibited by the treaty or is clearly contrary to its object and purpose may not be formulated unless none of the other contracting parties objects,[368] after having been duly consulted by the depositary.[369]

(8) The Commission nevertheless considered that it should proceed cautiously. This explains the phrase "shall be deemed permissible if", which is intended to indicate that, while the reservation remains impermissible in principle, the subsequent agreement of the parties has, in fact, modified the original treaty, thereby enabling the author of the reservation to avail itself of the reservation after all. Furthermore, the phrase should be understood as allowing for the possibility of the reservation being declared impermissible on other grounds by a body competent to decide on such matters.

(9) The phrase "at the request of a contracting State or a contracting organization" appearing at the end of the guideline is intended to make it clear that the initiative must come from the contracting parties and that the Commission does not intend to derogate from the strict limits laid down by article 77 of the 1969 Vienna Convention and article 78 of the 1986 Vienna Conventions concerning the functions of depositaries. The phrase is also in keeping with part of the rationale behind the present guideline, which aims to facilitate the reservations dialogue.

(10) The Commission is aware that guideline 3.3.3 does not take a position on the time period within which contracting States and organizations must react (or be deemed not to have objected to the reservation producing its effects). It might be thought that the "customary" 12-month period, within which, in accordance with the provisions of article 20, paragraph 5, of the Vienna Conventions, guideline 2.6.13 allows States to object to a reservation, would be appropriate. However, legally, such a transposition is not inevitable: all the parties to a treaty always have the right to modify it by agreement without any time limit. On the other hand, allowing for this possibility to remain open indefinitely could undermine the security of treaty relations. Faced with such conflicting considerations, the Commission has preferred to leave matters open. The silence of the guideline on this point implies that the contracting States and organizations should react within a reasonable period of time.[370]

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[368] Guideline 2.3.1 (Late formulation of a reservation) reads: "Unless the treaty provides otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty *except if none of the other Contracting Parties objects to the late formulation of the reservation.*"

[369] See draft guideline 2.1.8 (Procedure in case of manifestly impermissible reservations) and the commentary thereto (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), pp. 359–361). For more on this issue, see R. Riquelme Cortado, footnote 343 above, pp. 223–230.

[370] As the International Court of Justice underlined in the context of rules governing the termination of treaties: "Precisely what periods of time may be involved in the observance of the duties to consult and negotiate, and what period of notice of termination should be given, are matters which necessarily vary according to the requirements of the particular case. In principle, therefore, it is for the parties in each case to determine the length of those periods by consultation and negotiation in good faith. Some indications as to the possible periods involved, as the Court has said, can be seen in provisions of host agreements, including Section 37 of the Agreement of 25 March 1951, as well as in article 56 of the Vienna Convention on the Law of Treaties and in the corresponding article of the International Law Commission's draft articles on treaties between States and international organizations or between

(11) Like guideline 3.3.2,[371] guideline 3.3.3 is placed in Part 3 of the Guide to Practice on the permissibility of reservations. In any event, it would be illogical to place such a draft guideline in the part that deals with the effects of invalid reservations. By definition, the reservation in question here has become permissible by reason of the unanimous acceptance or the absence of unanimous objection.

3.4 Permissibility of reactions to reservations[372]

Commentary

(1) Unlike the case of reservations, the Vienna Conventions do not set forth any criteria or conditions for the permissibility of reactions to reservations, although acceptances and objections occupy a substantial place as a means for States and international organizations to give or refuse their consent to a permissible reservation. Such reactions do not, however, constitute criteria for the permissibility of a reservation that can be evaluated objectively in accordance with the conditions established in article 19 of the Vienna Conventions and independently of the acceptances or objections to which the reservation has given rise. They are a way for States and international organizations to express their point of view regarding the permissibility of a reservation, but the permissibility (or impermissibility) of a reservation must be evaluated independently of the acceptances or objections to which it gave rise. Moreover, this idea is clearly expressed in guideline 3.3 (Consequences of the impermissibility of a reservation). The fact remains, however, that acceptances and objections constitute a way for States and international organizations to express their point of view regarding the permissibility of a reservation, and they may accordingly be taken into account in assessing the permissibility of a reservation.[373]

(2) The *travaux préparatoires* of the Vienna regime in respect of objections leave no doubt as to the lack of connection between the permissibility of a reservation and the reactions thereto.[374] It also follows that while it may be appropriate to refer to the "permissibility" of an objection or acceptance, the term does not have the same connotation as in the case of reservations themselves. The main issue is whether the objection or acceptance can produce its full effects. This is why, according to one view, guidelines 3.4.1 and 3.4.2 should have been placed, not in the part of the Guide to Practice dealing with the permissibility of reservations and related unilateral declarations,[375] but in the part on the effects of reservations and of these other declarations (Guide, Part 4).

3.4.1 Permissibility of the acceptance of a reservation

The express acceptance of an impermissible reservation is itself impermissible.

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international organizations. But what is reasonable and equitable in any given case must depend on its particular circumstances." (Advisory Opinion of 20 December 1980, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, I.C.J. Reports 1980*, p. 96; see also International Court of Justice Judgment of 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction of the Court and Admissibility of the Application), *I.C.J. Reports 1984*, p. 420, para. 63.

[371] See paras. (6) and (7) of the commentary to guideline 3.3.2.

[372] The Special Rapporteur wishes to recall that he remains convinced that these two guidelines do not belong in the Part 3 of the Guide to Practice (with, perhaps, the very marginal exception of certain extremely hypothetical objections "with intermediate effect").

[373] See below the commentary to guideline 4.5.3 [4.5.4].

[374] See above the commentary to guideline 2.6.3, paras. 4–6.

[375] See the draft guideline originally proposed by the Special Rapporteur: "3.4 Substantive validity of acceptances and objections: Acceptances of reservations and objections to reservations are not subject to any condition of substantive validity." (Fourteenth report, A/CN.4/614/Add.1, para. 127).

Commentary

(1) This guideline is based on the idea that, in the light of the *travaux préparatoires*, the Vienna Convention does in fact establish some connection and puts forward the principle that the impermissibility of the reservation has some implications for its acceptance.[376]

(2) It seems clear that contracting States or international organizations can freely accept a reservation that is permissible and that the permissibility of such acceptances cannot be questioned.[377] However, according to a majority of members of the Commission, such is not the case where a State or an international organization accepts a reservation that is impermissible.

(3) While acceptance cannot determine the permissibility of a reservation, commentators have argued that the opposite is not true:

> An acceptance of an inadmissible reservation is theoretically not possible. Directly or indirectly prohibited reservations under article 19 (1) (a) and (b) cannot be accepted by any confronted state. Such reservations and acceptances of these will not have any legal effects. (…) Similarly, an incompatible reservation under article 19 (1) (c) should be regarded as incapable of acceptance and as eo ipso invalid and without any legal effect.[378]

(4) This is the view that the Commission has adopted. It has considered that the express acceptance of a reservation could have effects, if not on the permissibility of a reservation as such, then at least on the assessment of such permissibility, in that such a declaration, which is derived from a deliberate and considered act of a State or an international organization, must at least be taken into consideration by those who are assessing the permissibility or impermissibility of the reservation.

(5) The principle put forward in guideline 3.4.1 must be accompanied by two major caveats, however. Firstly — as the wording itself indicates — it applies only to express acceptances (which are exceedingly rare in practice) and excludes tacit acceptances. Second, what the contracting parties cannot do individually they can do collectively, in that the Commission has taken the view that conversely, when all of the contracting parties accept a reservation, this unanimity creates an agreement among the parties that modifies the treaty.[379]

3.4.2 Permissibility of an objection to a reservation

An objection to a reservation by which a State or an international organization purports to exclude in its relations with the author of the reservation the application of provisions of the treaty to which the reservation does not relate is only permissible if:

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[376] According to a minority theory ("effects"), the impermissibility of the reservation does not nullify its acceptance but prevents it from producing effects (see guideline 4.5.3 [4.5.4]).

[377] See below guideline 4.1 and the commentary thereto. See also the commentary to guideline 2.8.2 (Express acceptance of a reservation), *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), pp. 232–235.

[378] See F. Horn, footnote 321 above, p. 121.

[379] See above guideline 3.3.3 [3.3.4]. See also the commentary to guideline 2.3.1, in particular para. (8) (*Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 186), and the commentary to guideline 2.3.5, in particular para. (7) (*Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), p. 271).

(1) the additional provisions thus excluded have a sufficient link with the provisions to which the reservation relates; and[380]

(2) the objection would not defeat the object and purpose of the treaty in the relations between the author of the reservation and the author of the objection.

Commentary

(1) Guideline 3.4.2 relates solely to a very particular category of objections, frequently called those with "intermediate effect", through which a State or international organization considers that treaty relations should be excluded beyond what is provided for in article 21, paragraph 3, of the Vienna Conventions, yet does not oppose the entry into force of the treaty between itself and the author of the reservation. The Commission has noted the existence of such objections, which might be called the "third type" of objections, in the commentary to guideline 2.6.1 on the definition of objections to reservations, without taking a position on their permissibility.[381]

(2) While treaty practice provides relatively few specific examples of intermediate-effect or "extensive" objections, some do exist. It would seem, however, that this "*nueva generación*"[382] ("new generation") of objections grew up exclusively around reservations to the 1969 Vienna Convention itself: some States agreed that the Convention could enter into force between themselves and the authors of the reservations, excluding not only the provisions on which the reservations in question had been made,[383] but also other articles that were related to them.[384] These objections thus had a much broader scope than that of objections with "minimum effect", without the authors of the objections stating that they were not bound by the treaty *vis-à-vis* the author of the reservation. While a number of States parties to the Vienna Convention made objections to these reservations that were limited to the "presumed" effects envisaged in article 21, paragraph 3, of the 1969 Vienna Convention,[385] other States — Canada,[386] Egypt,[387] Japan,[388] the Netherlands,[389] New Zealand,[390] Sweden,[391] the United Kingdom[392] and the United States[393] — intended their

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[380] Suggestion from the Special Rapporteur: in the French text, the word "*que*" is supererogatory and should be deleted. This remark does not apply to the English text.

[381] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), p. 199, para. (23) of the commentary to guideline 2.6.1.

[382] R. Riquelme Cortado, footnote 343 above, p. 293.

[383] As a general rule, article 66 of the Convention and the annex thereto (see the reservations formulated by Algeria (*Multilateral Treaties ...*, footnote 341 above, chap. XXIII.1), Belarus (*ibid.*), China (*ibid.*), Cuba (*ibid.*), Guatemala (*ibid.*), the Russian Federation (*ibid.*), the Syrian Arab Republic (*ibid.*), Tunisia (*ibid.*), Ukraine (*ibid.*) and Viet Nam (*ibid.*). Bulgaria, the Czech Republic, Hungary and Mongolia had formulated similar reservations but withdrew them in the early 1990s (*ibid.*). The German Democratic Republic had also formulated a reservation excluding the application of article 66 (*ibid.*).

[384] These are the other provisions in Part V of the Vienna Convention, in particular article 64 on *jus cogens* (arts. 53 and 64). See also para. (9) below.

[385] This is the case with Denmark and Germany (*ibid.*).

[386] In respect of the reservation by the Syrian Arab Republic (*ibid.*).

[387] Egypt's objection is directed not at one reservation in particular, but at any reservation that excludes the application of article 66 (*ibid.*).

[388] In respect of any reservation that excludes the application of article 66 or the annex to the Vienna Convention (*ibid.*).

[389] In respect of all States that had formulated reservations concerning the compulsory dispute settlement procedures. This general declaration was reiterated separately for each State that had formulated such a reservation (*ibid.*).

[390] In respect of Tunisia's reservation (*ibid.*).

objections to produce more serious consequences but did not wish to exclude the entry into force of the Vienna Convention as between themselves and the reserving States.[394] Indeed, these States not only wanted to exclude the application of the obligatory dispute settlement provision or provisions "to which the reservation refers"; they also did not consider themselves bound by the substantive provisions to which the dispute settlement procedure or procedures apply in their bilateral relations with the reserving State. For example, the United States, in its objection to Tunisia's reservation to article 66 (a) of the Vienna Convention, stated that:

> The United States Government intends, at such time as it becomes a party to the Convention, to reaffirm its objection […] and declare that it will not consider that article 53 or 64 of the Convention is in force between the United States of America and Tunisia.[395]

(3) While the 1969 and 1986 Vienna Conventions do not expressly authorize these objections with intermediate effect, they do not prohibit them. On the contrary, objections with intermediate effect, as their name indicates, may be entertained in that they fall midway between the two extremes envisaged under the Vienna regime: they purport to prohibit the application of the treaty to an extent greater than a minimum-effect objection (article 21, paragraph 3, of the Vienna Conventions), but less than a maximum-effect objection (article 20, paragraph 4 (b), of the Vienna Conventions).[396]

(4) Although in principle, "a State or international organization may formulate an objection to a reservation irrespective of the permissibility of the reservation",[397] the question arises whether objections with intermediate effect must in some cases be deemed to be impermissible.

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[391] In respect of any reservation that excludes application of the dispute settlement provisions, in general, and of the reservations made by Cuba, the Syrian Arab Republic and Tunisia, in particular (*ibid.*).

[392] Provided in its declaration of 5 June 1987 and with the exception of Viet Nam's reservation.

[393] The objections made by the United States were formulated before it became a contracting party and concern the reservations made by the Syrian Arab Republic, Tunisia and Cuba (*ibid.*).

[394] The United Kingdom made maximum-effect objections, in due and proper form, to the reservations formulated by the Syrian Arab Republic and Tunisia. The effect of these objections seems, however, to have been mitigated *a posteriori* by the United Kingdom's declaration of 5 June 1987, which constitutes in a sense the partial withdrawal of its earlier objection (see draft guideline 2.7.7 and the commentary thereon (*Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), pp. 237–240), since the author does not oppose the entry into force of the Convention as between the United Kingdom and a State that has made a reservation to article 66 or to the annex to the Vienna Convention and excludes only the application of Part V in their treaty relations. This declaration, which the United Kingdom recalled in 1989 (with regard to Algeria's reservation) and 1999 (with regard to Cuba's reservation), states that "[w]ith respect to any other reservation the intention of which is to exclude the application, in whole or in part, of the provisions of article 66, to which the United Kingdom has already objected or which is made after the reservation by [the USSR], the United Kingdom will not consider its treaty relations with the State which has formulated or will formulate such a reservation as including those provisions of Part V of the Convention with regard to which the application of article 66 is rejected by the reservation". (*ibid.*) Nevertheless, in 2002, the United Kingdom again objected with maximum effect to the reservation made by Viet Nam by excluding all treaty relations with Viet Nam (*ibid.*). New Zealand also chose to give its objection to the Syrian reservation maximum effect (*ibid.*).

[395] *Ibid.*

[396] See Daniel Müller's commentary on article 21 in Olivier Corten and Pierre Klein (eds.), *Les Conventions de Vienne sur le droit des traités, Commentaire article par article* (Bruylant: Brussels, 2006), pp. 925–926, paras. 67–69.

[397] Guideline 2.6.3 (Freedom to formulate objections).

(5) Some authors propose to consider that "these extended objections are, in fact, reservations (limited *ratione personae*)".[398] This analysis is to some extent supported by the fact that other States have chosen to formulate reservations in the strict sense of the word in order to achieve the same result.[399] Thus, Belgium formulated a (late) reservation concerning the Vienna Convention, stating that:

> The Belgian State will not be bound by articles 53 and 64 of the Convention with regard to any party which, in formulating a reservation concerning article 66 (2), objects to the settlement procedure established by this article.[400]

As has been written:

> As a partial rejection modifies the content of the treaty in relation to the reserving State to an extent that exceeds the intended effect of the reservation, acceptance or acquiescence on the part of the reserving State appear to be necessary for a partial rejection to take its effect; failing this, no relations under the treaty are established between the reserving State and an objecting State which partially rejects those relations.[401]

(6) This approach has been disputed on the grounds that, by adhering to the letter of the definition of reservations,[402] the objecting State, which typically formulates its objection only after having become a party to the treaty, would be prevented from doing so within the established time period, and would be faced with the uncertainties that characterize the regime of late reservations.[403] Then, subject to the "reservations dialogue" that might be established, the reserving State would not, in principle, be in a position to respond effectively to such an objection. It has also been pointed out that it would be contradictory to make objections with intermediate effect subject to conditions of permissibility while maximum-effect objections are not subject to such conditions and that the determination and assessment of the necessary link between the provisions which could potentially be deprived of legal effect by the interaction between a reservation and a broad objection has more to do with the question of whether or not the objection with intermediate effect can produce the effect intended by its author.[404]

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[398] See, *inter alia*, J. Sztucki, "Some Questions Arising from Reservations to the Vienna Convention on the Law of Treaties", *German Yearbook of International Law*, 1977, p. 297. The author suggests that such declarations should be viewed as "objections only to the initial reservations and own reservations of the objecting States in the remaining part" (*ibid.*, p. 291).

[399] Belgium's reservation quoted below is quite similar in spirit, purpose and technique to the conditional objections envisaged in draft guideline 2.6.14. See, *inter alia*, Chile's objection to the 1969 Vienna Convention, quoted in the commentary on draft guideline 2.6.14 (*Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), pp. 218–219, para. (2)).

[400] *Multilateral Treaties ...* , chap. XXIII.1, footnote 383 above.

[401] G. Gaja, footnote 364 above, p. 326. See also R. Baratta, *Gli effetti delle riserve ai trattati* (A. Giuffrè: Milan, 1999), p. 385.

[402] See guideline 1.1 (and article 2, paragraph 1 (b), of the Vienna Conventions).

[403] See section 2.3 of the Guide (*Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 184–192, and *Fifty-ninth Session, Supplement No. 10* (A/59/10), pp. 269–274).

[404] According to this view, "it is one thing to say that an objection with intermediate effect is not valid and quite another to maintain that such an objection cannot produce the effect intended by its author. Thus, the issue does not bear on the validity of an objection and should therefore be included not in the part of the Guide to Practice on the substantive validity of declarations in respect of treaties, but rather in the part dealing with the effects that an objection with intermediate effect can actually produce" (fourteenth report on reservations to treaties, A/CN.4/614/Add.1, para. 118).

(7) The Commission was not convinced by this view and considered that objections with intermediate effect, which in some ways constitute "counter-reservations" (but are certainly not reservations *per se*), should conform to the conditions for the permissibility and form of reservations and, in any event, cannot defeat the object and purpose of the treaty, if only because it makes little sense to apply a treaty deprived of its object or purpose. This is what is stated in guideline 3.4.2, paragraph 2.

(8) Nevertheless, it would be unacceptable and entirely contrary to the principle of consensus[405] for States and international organizations to use a reservation as an excuse for attaching intermediate-effect objections of their choosing, thereby excluding any provision that they do not like. A look back at the origins of objections with intermediate effect is revealing in this regard.

(9) As pointed out above,[406] the practice of making these objections with intermediate effect has been resorted to mainly, if not exclusively, in the case of reservations and objections to the provisions of Part V of the 1969 Vienna Convention and makes clear the reasons which led objecting States to seek to make use of them. Article 66 of the Vienna Convention and its annex relating to compulsory conciliation provide procedural guarantees which many States, at the time when the Convention was adopted, considered essential in order to prevent abuse of certain provisions of Part V.[407] This link was stressed by some of the States that formulated objections with intermediate effect in respect of reservations to article 66. For example:

> The Kingdom of the Netherlands is of the view that the provisions regarding the settlement of disputes, as laid down in article 66 of the Convention, are an important part of the Convention and *cannot be separated* from the substantive rules with which they are connected.[408]

The United Kingdom stated even more explicitly that:

> Article 66 provides in certain circumstances for the compulsory settlement of disputes by the International Court of Justice (...) or by a conciliation procedure (...). These provisions are inextricably linked with the provisions of Part V to which they relate. Their inclusion was the basis on which those parts of Part V which represent progressive development of international law were accepted by the Vienna Conference.[409]

(10) The reaction of several States to reservations to article 66 of the 1969 Vienna Convention was aimed at safeguarding the package deal which some States had sought to undermine through reservations and which, save through a maximum-effect reservation,[410] could only be restored through an objection that went beyond the "normal" effects of the reservations envisaged by the Vienna Conventions.[411]

(11) It is thus clear from the practice concerning objections with intermediate effect that there must be an intrinsic link between the provision which gave rise to the reservation and the provisions whose legal effect is affected by the objection.

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[405] See, *inter alia*, the commentary to guideline 3.1.7, in particular paragraph (3) (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), pp. 82–88).

[406] Para. (2).

[407] J. Sztucki, footnote 398 above, pp. 286 and 287 (see also the references provided by the author).

[408] Italics added – see footnote 389 above.

[409] United Kingdom, objection of 5 June 1987 in respect of a Soviet reservation to article 66 of the Vienna Convention; see footnote 392 above.

[410] See articles 20, paragraphs 4 (b), and 21, paragraph 3, of the Vienna Conventions.

[411] D. Müller, Commentary on article 21, footnote 396 above, pp. 927–928, para. 70.

(12) After asking itself how best to define this link, and having contemplated calling it "intrinsic", "indissociable" or "inextricable", the Commission ultimately settled on the word "sufficient", which seemed to it to be similar to the words just cited but had the merit of showing that the particular circumstances of each case had to be taken into account. Moreover, guideline 3.4.2 probably has more to do with the progressive development of international law than with its codification *per se*; to the majority of the Commission's members, the use of the word "sufficient" had the merit of leaving room for the clarification that might come from future practice.

(13) Other limitations on the permissibility of objections with intermediate effect have been suggested. It has been pointed out that it seems logical to exclude objections aimed at articles to which reservations are not permitted under article 19, subparagraphs (a) and (b), of the Vienna Conventions.[412] The Commission does not disagree, but such hypotheses are so hypothetical and marginal that it seems unnecessary to address them expressly in guideline 3.4.2.

(14) It has also been pointed out that since, according to guideline 3.1.9, "a reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law",[413] the same should be true of objections with intermediate effect. The Commission has not adopted that point of view, considering that objections, even those with intermediate effect, are not reservations and have the main purpose of undermining the reservation, and that the latter's "proximity" to the provisions excluded by the objection[414] suffices to avert any risk of lack of conformity with *jus cogens*.

(15) Consequently, the Commission deliberately rejected the idea of referring to the impermissibility of an objection owing to its being contrary to a rule of *jus cogens*: it thought that, in reality, such a hypothesis could not arise.

(16) It is quite clear that if the effect of an objection is to modify the bilateral treaty relations between its author and the author of the reservation in a manner that proves to be contrary to a peremptory norm of international law (*jus cogens*), this result would be unacceptable. Such an eventuality would, however, seem to be impossible: an objection purports only to, and can only, exclude the application of one or more treaty provisions. Such an exclusion cannot "produce" a norm that is incompatible with a *jus cogens* norm. The effect is simply "deregulatory", thus leading to the application of customary law. Ultimately, therefore, the norms applicable as between the author of the reservation and the author of the objection are never different from those that predated the treaty and, unless application of the treaty as a whole is excluded, from treaty-based provisions not affected by the reservation. It is impossible under these circumstances to imagine an "objection" that would violate a peremptory norm. According to another view, however, it was conceivable that a "deregulation" of one obligation could lead to a modification of related obligations under the treaty.

(17) Furthermore, when the definition of "objection" was adopted, the Commission refused to take a position on the question of the permissibility of objections that purport to produce a "super-maximum" effect.[415] These are objections in which the authors determine not only that the reservation is not valid but also that, as a result, the treaty as a whole applies *ipso facto* in the relations between the two States. The permissibility of objections

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[412] The text of which is incorporated in guideline 3.1 in the Guide to Practice.

[413] See the text of this guideline and the commentary thereto in *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), pp. 99–104.

[414] See guideline 3.4.2, para. 1.

[415] See paragraph 24 of the commentary on draft guideline 2.6.1 (Definition of objections to reservations) (*Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), p. 200).

with super-maximum effect has frequently been questioned,[416] primarily because "the effect of such a statement is not to bar the application of the treaty as a whole or of the provisions to which the reservation refers in the relations between the two Parties but to render the reservation null and void without the consent of its author. This greatly exceeds the consequences of the objections to reservations provided for in article 21, paragraph 3, and article 20, paragraph 4 (b), of the Vienna Conventions. Whereas 'unlike reservations, objections express the attitude of a State, not in relation to a rule of law, but in relation to the position adopted by another State', in this case it is the rule itself advocated by the reserving State which is challenged, and this is contrary to the very essence of an objection".[417]

(18) It is not, however, the permissibility of the objection as such that is called into question; the issue raised by this practice is whether the objection is capable of producing the effect intended by its author;[418] this is far from certain and depends, among other things, on the permissibility of the reservation itself.[419] A State (or an international organization) may well make an objection and wish to give it super-maximum effect, but this does not mean that the objection is capable of producing such an effect, which is not envisaged by the Vienna regime. However, as the Commission has acknowledged in its commentary on guideline 2.6.1, where the definition of the term "objection" unquestionably includes objections with super-maximum effect:

> The Commission has endeavoured to take a completely neutral position with regard to the validity of the effects [and not of the objection] that the author of the objection intends its objection to produce. This is a matter to be taken up in the consideration of the effects of objections.[420]

(19) Furthermore, it should be reiterated that one who has initially accepted a reservation may no longer properly formulate an objection thereto. While this condition may be understood as a condition for the permissibility of an objection, it may also be viewed as a question of form or of formulation. Thus, guideline 2.8.12 (Final nature of acceptance of a reservation) states that "acceptance of a reservation cannot be withdrawn or amended". There seems to be no need to revisit the issue in the present guideline.

3.5 Permissibility of an interpretative declaration

A State or an international organization may formulate an interpretative declaration unless the interpretative declaration is prohibited by the treaty or is incompatible with a peremptory norm of general international law.

Commentary

(1) The Vienna Conventions do not contain any rule on interpretative declarations as such, or, of course, on the conditions for the permissibility of such unilateral declarations.

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[416] See the eighth report on reservations to treaties, A/CN.4/535/Add.1, paragraphs 97 and 98 and footnote 154. See also the commentary on draft guideline 2.6.1, *inter alia*, paragraphs (24) and (25), (*Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), p. 200).

[417] *Ibid.*, para. 97.

[418] See the eighth report on reservations to treaties, A/CN.4/535/Add.1, paragraph 95, and the commentary to guideline 2.6.1, paragraph (24) (*Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), p. 200).

[419] See below, guidelines 4.3.4 and 4.5.3.

[420] See paragraph (25) of the commentary on guideline 2.6.1 (Definition of objections to reservations) (*Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/60/10), p. 200).

From that point of view, and from many others as well, they are distinct from reservations and cannot simply be equated with them. Guideline 3.5 and the ones that follow it seek to fill in this gap in respect of the permissibility of these instruments, it being understood in this connection that "simple" interpretative declarations (guideline 3.5) must be distinguished from conditional interpretative declarations, which in this respect follow the legal regime of reservations (guidelines 3.5.2 and 3.5.3). This does not mean that reservations are involved, although sometimes a unilateral declaration presented as interpretative by its author might be a true reservation, in which case its permissibility must be assessed in the light of the rules applicable to reservations (guideline 3.5.1).

(2) The definition of interpretative declarations provided in guideline 1.2 (Definition of interpretative declarations) is also limited to identifying the practice in positive terms:

> "Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.[421]

(3) However, this definition, as noted in the commentary, "in no way prejudges the validity or the effect of such declarations and (…) the same precautions taken with respect to reservations must be applied to interpretative declarations: the proposed definition is without prejudice to the permissibility and the effects of such declarations from the standpoint of the rules applicable to them".[422]

(4) There is, however, still some question as to whether an interpretative declaration can be permissible, a question that is clearly different from that of whether a unilateral statement constitutes an interpretative declaration or a reservation. Indeed, it is one thing to determine whether a unilateral statement "purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions" — which corresponds to the definition of "interpretative declaration" — and another to determine whether the interpretation proposed therein is valid, or, in other words, whether the "meaning or scope attributed by the declarant to a treaty or to certain of its provisions" is valid.

(5) The issue of the permissibility of interpretative declarations can doubtless be addressed in the treaty itself;[423] while this is quite uncommon in practice, it is still a possibility. Thus, a treaty's prohibition of any interpretative declaration would invalidate any declaration that purported to "specify or clarify the meaning or scope" of the treaty or certain of its provisions. Article XV. 3 of the 2001 Canada-Costa Rica Free Trade Agreement[424] is an example of such a provision. Other examples exist outside the realm of bilateral treaties. The third draft agreement for the Free Trade Area of the Americas (FTAA) of November 2003, though still in the drafting stage, states in Chapter XXIV, draft article 4:

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[421] *Yearbook... 1999*, vol. II, Part Three, p. 103.

[422] *Ibid.*, p. 108, paragraph (33) of the commentary. The French term "*licéité*", used in 1999, should now be understood, as in the case of reservations, to mean "*validité*", a word which, in the view of the Commission, seems, in all cases, to be more appropriate (see *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 357).

[423] M. Heymann, *Einseitige Interpretationserklärungen zu multilateralen Verträgen* ("Unilateral Interpretative Declarations to Multilateral Treaties"), (Berlin: Duncker & Humblot, 2005), p. 114.

[424] Article XV. 3 – Reservations: "This Agreement shall not be subject to unilateral reservations or unilateral interpretative declarations" (available from http://www.sice.oas.org/Trade/cancr/English/text3_e.asp).

> This Agreement shall not be subject to reservations [or unilateral interpretative declarations] at the moment of its ratification.[425]

(6) It is also conceivable that a treaty might merely prohibit the formulation of certain interpretative declarations to certain of its provisions. To the Special Rapporteur's knowledge, no multilateral treaty contains such a prohibition in this form. But treaty practice includes more general prohibitions which, without expressly prohibiting a particular declaration, limit the parties' capacity to interpret the treaty in one way or another. It follows that if the treaty is not to be interpreted in a certain manner, interpretative declarations proposing the prohibited interpretation are invalid. The European Charter for Regional or Minority Languages of 5 November 1992 includes examples of such prohibition clauses; article 4, paragraph 4, states:

> Nothing in this Charter shall be construed as limiting or derogating from any of the rights guaranteed by the European Convention on Human Rights.

And article 5 states:

> Nothing in this Charter may be interpreted as implying any right to engage in any activity or perform any action in contravention of the purposes of the Charter of the United Nations or other obligations under international law, including the principle of the sovereignty and territorial integrity of States.

(7) Similarly, articles 21 and 22 of the Framework Convention for the Protection of National Minorities of 1 February 1995 also limits the potential to interpret the Convention:

> Article 21
>
> Nothing in the present framework Convention shall be interpreted as implying any right to engage in any activity or perform any act contrary to the fundamental principles of international law and in particular of the sovereign equality, territorial integrity and political independence of States.
>
> Article 22
>
> Nothing in the present framework Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any Contracting Party or under any other agreement to which it is a Party.

(8) These examples show that the prohibition of interpretative declarations in guideline 3.5 may be express as well as implicit.

(9) With the exception of treaty-based prohibitions of unilateral interpretative declarations, the Commission believes that another ground for the impermissibility of an interpretative declaration must be cited: the fact that the declaration is contrary to a peremptory norm of general international law (*jus cogens*).

(10) While there appear to be no specific cases when a party has invoked *vis-à-vis* the author of an interpretative declaration the fact that it is contrary to a peremptory norm, one cannot assume that the problem will never arise in the future. Such would be the case, for example, if a State party to the Convention against Torture sought to legitimize certain forms of torture under cover of an interpretation, or if a State that was a party to the Convention on the Prevention and Punishment of the Crime of Genocide interpreted it as not covering certain forms of genocide – even though it has been pointed out that, in these

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[425] See the FTAA website, http://www.ftaa-alca.org/FTAADraft03/ChapterXXIV_e.asp; the square brackets are original to the text.

examples, these so-called "interpretations" could be considered reservations and could fall within the purview of guideline 3.5.1.

(11) This is why, although there was a different point of view, the Commission did not consider it necessary to provide in guideline 3.5 for a situation when an interpretative declaration was incompatible with the object and purpose of the treaty: that would be possible only if the declaration was considered a reservation, since by definition such declarations do not purport to modify the legal effects of a treaty, but only to specify or clarify them.[426] This situation is covered in guideline 3.5.1.

(12) Similarly, but for different reasons, and despite the opposing views of some of its members, the Commission declined to consider that an objectively wrong interpretation — for example, one that is contrary to the interpretation given by an international court adjudicating the matter — should be declared impermissible.

(13) It goes without saying that an interpretation may be held to be with or without merit although, in absolute terms, it is difficult to determine whether the author is right or wrong until a competent body rules on the interpretation of the treaty. Interpretation remains an eminently subjective process and it is rare that a legal provision, or a treaty as a whole, can be interpreted in only one way. "The interpretation of documents is to some extent an art, not an exact science."[427]

(14) As Kelsen has noted:

> If "interpretation" is understood as cognitive ascertainment of the meaning of the object that is to be interpreted, then the result of a legal interpretation can only be the ascertainment of the frame which the law that is to be interpreted represents, and thereby the cognition of several possibilities within the frame. The interpretation of a statute, therefore, need not necessarily lead to a single decision as the only correct one, but possibly to several, which are all of equal value ...[428]

As has also been pointed out:

> The process of interpretation [in international law] is, in fact, only occasionally centralized, either through a judicial body or in some other way. Competence to interpret lies with all subjects and, individually, with each one of them. The resulting proliferation of forms of interpretation is only partially compensated for by their hierarchy. Unilateral interpretations are, in principle, of equal value, and the agreed forms are optional and consequently unpredictable. However, the practical difficulties must not be overestimated. It is not so much a question of an essential flaw in international law as an aspect of its nature, which guides it in its entirety towards an ongoing negotiation that can be rationalized and channelled using the rules currently in force.[429]

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[426] *Yearbook ... 1998*, vol. II, Part Two, p. 100 (paragraph 16 of the commentary to draft guideline 1.2). See also the famous dictum of the International Court of Justice in *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion of 18 July 1950, I.C.J. Reports 1950*, p. 229; and the 27 August 1952 judgment of the Court in *Rights of Nationals of the United States of America in Morocco (France v. the United States of America), I.C.J. Reports 1952*, p. 196.

[427] *Yearbook ... 1966*, vol. II, p. 218, para. 4. See also Anthony Aust, *Modern Treaty Law and Practice*, 2nd ed., (Cambridge and New York: Cambridge University Press, 2007), p. 230.

[428] Hans Kelsen, *Pure Theory of Law*, tr. Max Knight (Berkeley and Los Angeles: University of California Press, 1967), p. 351.

[429] Jean Combacau and Serge Sur, *Droit international public*, 8th ed. (Paris: Montchrestien, 2008), p. 171.

(15) Thus, "on the basis of its sovereignty, every State has the right to indicate its own understanding of the treaties to which it is party".[430] If States have the right to interpret treaties unilaterally, they must also have the right to let their point of view be known as regards the interpretation of a treaty or of certain of its provisions.

(16) International law does not, however, provide any criterion allowing for a definitive determination of whether a given interpretation has merit. There are, of course, methods of interpretation (see, initially, articles 31 to 33 of the Vienna Conventions), but they are only guidelines as to the ways of finding the "right" interpretation; they do not offer a final "objective" (or "mathematical") test of whether the interpretation has merit. Thus, article 31, paragraph 1, of the Vienna Conventions specifies that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose*". This specification is in no way a criterion for assessing the correctness, and still less a condition for the validity, of the interpretations given to the treaty, but a means of deriving one interpretation. That is all.

(17) In international law, the value of an interpretation is assessed not on the basis of its content, but of its authority. It is not the "right" interpretation that wins out, but the one that was given either by all the parties to the treaty — in which case it is called an "authentic" interpretation — or by a body empowered to interpret the treaty in a manner that is binding on the parties. In that regard, the instructive 1923 opinion of the Permanent Court of International Justice in the *Jaworzina* case is noteworthy. Although the Court was convinced that the interpretation reached by the Conference of Ambassadors was unfounded, it did not approach the problem as a question of validity, but rather of opposability. The Court stated:

> And even leaving out of the question the principles governing the authoritative interpretation of legal documents, it is obvious that the opinion of the authors of a document cannot be endowed with a decisive value when that opinion has been formulated after the drafting of that document and conflicts with the opinion which they expressed at that time. There are still stronger grounds for refusing to recognize the authority of such an opinion when, as in the present case, a period of more than two years has elapsed between the day on which it was expressed and the day on which the decision to be interpreted was itself adopted.[431]

(18) International law in general and treaty law in particular do not impose conditions for the validity of interpretation in general and of interpretative declarations in particular. It has only the notion of the opposability of an interpretation or an interpretative declaration which, as far as it is concerned, comes into full play in the context of determination of the effects of an interpretative declaration.[432] In the absence of any condition for validity, "*[e]infache Interpretationserklärungen sind damit grundsätzlich zulässig*" ["simple interpretative declarations are therefore, in principle, admissible"][433] (translated for the report), although this does not mean that it is appropriate to speak of validity or non-validity unless the treaty itself sets the criterion.[434]

(19) In addition, it seemed to the Commission, despite a contrary view, that in the course of assessing the permissibility of interpretative declarations, one must not slip into the

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[430] Patrick Daillier and Alain Pellet, *Droit international public*, 7th ed. (Paris: L.G.D.J., 2002), p. 254. See also Charles Rousseau, *Droit international public*, vol. I, *Introduction et Sources* (Paris: Sirey, 1970), p. 250.

[431] Advisory opinion of 6 December 1923, *P.C.I.J., Series B*, No. 8, p. 38.

[432] See guidelines 4.7.1 to 4.7.3.

[433] M. Heymann, footnote 423 above, p. 113.

[434] See paragraphs (5) and (8) above.

domain of responsibility – which, for reservations, is prohibited by guideline 3.3.1. However, this would be the case for interpretative declarations if one considered that a "wrong" interpretation constituted an internationally wrongful act that "violated" articles 31 and 32 of the Vienna Convention.

3.5.1 Permissibility of an interpretative declaration which is in fact a reservation

If a unilateral statement which purports to be an interpretative declaration is in fact a reservation, its permissibility must be assessed in accordance with the provisions of guidelines 3.1 to 3.1.13.

Commentary

(1) Section 1.3 of the Guide to Practice deals with a situation in which the effect of an interpretative declaration is in fact to undermine the legal effect of one of the provisions of the treaty or of the treaty as a whole.[435] In such a situation, it is not an interpretative declaration but a reservation, which should be treated as such and should therefore meet the conditions for the permissibility (and formal validity) of reservations.

(2) The Court of Arbitration that settled the dispute between France and the United Kingdom concerning the delimitation of the continental shelf in the *Delimitation of the Continental Shelf between France and the United Kingdom* case confirmed this approach. In that case, the United Kingdom maintained that France's third reservation to article 6 of the Geneva Convention on the Continental Shelf was merely an interpretative declaration and subsequently rejected this interpretation on the grounds that it could not be invoked against the United Kingdom. The Court rejected this argument and considered that France's declaration was not simply an interpretation; it had the effect of modifying the scope of application of article 6 and was therefore a reservation, as France had maintained:

> This condition, according to its terms, appears to go beyond mere interpretation; for it makes the application of that régime dependent on acceptance by the other State of the French Republic's designation of the named areas as involving "special circumstances" regardless of the validity or otherwise of that designation under Article 6. Article 2 (1) (d) of the Vienna Convention on the Law of Treaties, which both Parties accept as correctly defining a "reservation", provides that it means "a unilateral statement, however phrased or named, made by a State … whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in its application to that State". This definition does not limit reservations to statements purporting to exclude or modify the actual terms of the treaty; it also covers statements purporting to exclude or modify the *legal effect* of certain provisions in their application to the reserving State. This is precisely what appears to the Court to be the purport of the French third reservation and it, accordingly, concludes that this "reservation" (*sic*: "declaration"?) is to be considered a "reservation" rather than an "interpretative declaration".[436]

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[435] It being understood that it is not enough for another State or another international organization to "recharacterize" an interpretative declaration as a reservation for the nature of the declaration in question to be modified (see guideline 2.9.3 (Recharacterization of an interpretative declaration) and the commentary thereto in *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), pp. 263–268).

[436] Arbitral award of 30 June 1977, Reports of International Arbitral Awards, vol. XVIII, p. 40, para. 55 (italics in the original).

(3) While States often maintain or suggest that an interpretation proposed by another State is incompatible with the object and purpose of the relevant treaty,[437] an interpretative declaration, by definition, cannot be contrary to the treaty or to its object or purpose. If it is otherwise, the statement is, in fact, a reservation, as noted in many States' reactions to "interpretative declarations".[438] Spain's reaction to the "declaration" formulated by Pakistan in signing the 1966 International Covenant on Economic, Social and Cultural Rights also demonstrates the different stages of thought in cases where the proposed "interpretation" is really a modification of the treaty that is contrary to its object and purpose. The term "declaration" must first be defined; only then will it be possible to apply to it conditions for permissibility (of reservations):

> The Government of the Kingdom of Spain has examined the Declaration made by the Government of the Islamic Republic of Pakistan on 3 November 2004 on signature of the International Covenant on Economic, Social and Cultural Rights, of 16 December 1966.
>
> The Government of the Kingdom of Spain points out that regardless of what it may be called, a unilateral declaration made by a State for the purpose of excluding or changing the legal effects of certain provisions of a treaty as it applies to that State constitutes a reservation.
>
> The Government of the Kingdom of Spain considers that the Declaration made by the Government of the Islamic Republic of Pakistan, which seeks to subject the application of the provisions of the Covenant to the provisions of the constitution of the Islamic Republic of Pakistan is a reservation which seeks to limit the legal effects of the Covenant as it applies to the Islamic Republic of Pakistan. A reservation that includes a general reference to national law without specifying its contents does not make it possible to determine clearly the extent to which the Islamic Republic of Pakistan has accepted the obligations of the Covenant and, consequently, creates doubts as to the commitment of the Islamic Republic of Pakistan to the object and purpose of the Covenant.
>
> The Government of the Kingdom of Spain considers that the Declaration made by the Government of the Islamic Republic of Pakistan to the effect that it subjects its obligations under the International Covenant on Economic, Social and Cultural Rights to the provisions of its constitution is a reservation and that that reservation is incompatible with the object and purpose of the Covenant.

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[437] See, for example, Germany's reactions to Poland's interpretative declaration to the European Convention on Extradition of 13 December 1957 (European Treaty Series No. 24 (http://conventions.coe.int)) and to India's declaration interpreting article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (*Multilateral Treaties* ..., footnote 341 above, chap. IV.3 and 4).

[438] In addition to the aforementioned example of Spain's reservation, see Austria's objection to the "interpretative declaration" formulated by Pakistan in respect of the 1997 International Convention for the Suppression of Terrorist Bombings and the comparable reactions of Australia, Canada, Denmark, Finland, France, Germany, India, Israel, Italy, Japan, the Netherlands, New Zealand, Norway, Spain, Sweden, the United Kingdom and the United States of America (*Multilateral Treaties* ..., footnote 341 above, chap. XVIII.9). See also the reactions of Germany and the Netherlands to Malaysia's unilateral statement (*ibid.*) and the reactions of Finland, Germany, the Netherlands and Sweden to the "interpretative declaration" formulated by Uruguay in respect of the Statute of the International Criminal Court (*ibid.*, chap. XVIII.10. For other examples of recharacterization, see the commentary to guideline 1.2, *Yearbook ... 1999*, vol. II, Part Two, p. 105, No. 328.

> According to customary international law, as codified in the Vienna Convention on the Law of Treaties, reservations that are incompatible with the object and purpose of a treaty are not permissible.
>
> Consequently, the Government of the Kingdom of Spain objects to the reservation made by the Government of the Islamic Republic of Pakistan to the International Covenant on Economic, Social and Cultural Rights. This objection shall not preclude the entry into force of the Covenant between the Kingdom of Spain and the Islamic Republic of Pakistan.[439]

(4) Therefore, the issue is not the "validity" of interpretative declarations. These unilateral statements are, in reality, reservations and accordingly must be treated as such, including with respect to their permissibility and formal validity. The European Court of Human Rights followed that reasoning in its judgement in the case of *Belilos v. Switzerland.* Having recharacterized Switzerland's declaration as a reservation, it applied the conditions for the permissibility *of reservations* of the European Convention on Human Rights:

> In order to establish the legal character of such a declaration, one must look behind the title given to it and seek to determine the substantive content. In the present case, it appears that Switzerland meant to remove certain categories of proceedings from the ambit of article 6 § 1 (art. 6–1) and to secure itself against an interpretation of that article (art. 6–1) which it considered to be too broad. However, the Court must see to it that the obligations arising under the Convention are not subject to restrictions which would not satisfy the requirements of article 64 (art. 64) as regards reservations. Accordingly, it will examine the validity of the interpretative declaration in question, as in the case of a reservation, in the context of this provision.[440]

[3.5.2 Conditions for the permissibility of a conditional interpretative declaration

The permissibility of a conditional interpretative declaration must be assessed in accordance with the provisions of guidelines 3.1 to 3.1.13.][441]

Commentary

(1) According to the definition contained in guideline 1.2.1, a conditional interpretative declaration is:

> A unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof (...).[442]

(2) Thus the key feature of this kind of conditional interpretative declaration is not that it proposes a certain interpretation, but that it constitutes a condition for its author's consent to be bound by the treaty.[443] It is that element of conditionality that brings a conditional interpretative declaration closer to being a reservation.

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[439] *Multilateral Treaties* ... footnote 341 above, chap. IV.3.

[440] Judgement, 29 April 1988, *Series A*, vol. 132, para. 49, p. 18.

[441] See above, footnote 145.

[442] *Yearbook ... 1999*, vol. II, Part Two, pp. 103–106.

[443] *Ibid.*, p. 105, para. (16) of the commentary.

(3) *A priori*, however, the question of the permissibility of conditional interpretative declarations seems little different from that of "simple" interpretative declarations and it would seem unwarranted to make formulation of a conditional interpretative declaration subject to conditions for permissibility other than those applicable to "simple" interpretative declarations.[444] It is clear from the definition of a conditional interpretative declaration that it does not purport to modify the treaty, but merely to interpret one or more of its provisions in a certain manner.

(4) The situation changes significantly, however, where the interpretation proposed by the author of a conditional interpretative declaration does not correspond to the interpretation of the treaty established by agreement between the parties. In that case, the condition formulated by the author of the declaration, stating that it does not consider itself to be bound by the treaty in the event of a different interpretation, brings this unilateral statement considerably closer to being a reservation. Frank Horn has stated that:

> If a state does not wish to abandon its interpretation even in the face of a contrary authoritative decision by a court, it may run the risk of violating the treaty when applying its own interpretation. In order to avoid this, it would have to qualify its interpretation as an absolute condition for participation in the treaty. The statement's nature as a reservation is established at the same time the propagated interpretation is established as the incorrect one.[445]

(5) Thus, any conditional interpretative declaration potentially constitutes a reservation: a reservation conditional upon a certain interpretation. This can be seen from one particularly clear example of a conditional interpretative declaration, the declaration that France attached to its expression of consent to be bound by its signature of Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Treaty of Tlatelolco), which stipulates that:

> In the event that the interpretative declaration thus made by the French Government should be contested wholly or in part by one or more Contracting Parties to the Treaty or to Protocol II, these instruments shall be null and void in relations between the French Republic and the contesting State or States.[446]

In other words, France intends to exclude the application of the treaty in its relations with any States parties that do not accept its interpretation of the treaty, exactly as if it had made a reservation.

(6) While this scenario is merely a potential one, it seems clear that the declaration in question is subject to the conditions for permissibility set out in article 19 of the Vienna Conventions. Although it might be thought *prima facie* that the author of a conditional interpretative declaration is merely proposing a specific interpretation (subject solely to the conditions for permissibility set out in guideline 3.5), the effects of such a unilateral statement are, in fact, made conditional by its author upon one or more provisions of the treaty not being interpreted in the desired manner.

(7) The deliberate decision of the Netherlands to formulate reservations, rather than interpretative declarations, to the International Covenant on Civil and Political Rights clearly shows the considerable similarities between the two approaches:

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[444] See above, commentary to guideline 3.5.

[445] F. Horn, footnote 321 above, p. 326.

[446] This declaration was confirmed in 1974 at the time of ratification (United Nations, *Treaty Series*, vol. 936, p. 419 (No. 9068)). See also the commentary to guideline 2.9.10 (Reactions to conditional interpretative declarations), *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), p. 281, para. (1) of the commentary.

> The Kingdom of the Netherlands clarif[ies] that although the reservations are partly of an interpretational nature, it has preferred reservations to interpretational declarations in all cases, since if the latter form were used doubt might arise concerning whether the text of the Covenant allows for the interpretation put upon it. By using the reservation form the Kingdom of the Netherlands wishes to ensure in all cases that the relevant obligations arising out of the Covenant will not apply to the Kingdom, or will apply only in the way indicated.[447]

(8) There is therefore no alternative to the application to these conditional interpretative declarations of the same conditions for permissibility as those that apply to reservations. The (precautionary) application of the conditions set out in article 19 of the Vienna Conventions is not easy, however, unless it has been established that the interpretation proposed by the author is unwarranted and does not correspond to the authentic interpretation of the treaty.

(9) Two opposing arguments have been made on this point. According to one view, so long as the status of the conditional interpretative declaration as to correctness has not been, or cannot be, determined, such a conditional interpretative declaration must meet both the conditions for the permissibility of an interpretative declaration (in the event that the interpretation is ultimately shared by the other parties or established by a competent body) and the conditions for the permissibility of a reservation (in the event that the proposed interpretation is rejected). So long as the correct interpretation has not been established, the conditional interpretative declaration remains undetermined and it is impossible to determine whether it is the rules on the permissibility of an interpretative declaration or those on the permissibility of a reservation that should be applied to it. Either case is still possible. According to this view, although a treaty may prohibit the formulation of reservations to its provisions, it does not follow that a State cannot subject its consent to be bound by the treaty to a certain interpretation of that treaty. If the interpretation proves to be warranted and in accordance with the authentic interpretation of the treaty, it is a genuine interpretative declaration that must meet the conditions for the permissibility of interpretative declarations, but only those conditions. If, however, the interpretation does not express the correct meaning of the treaty and is rejected on that account, the author of the "interpretative declaration" does not consider itself bound by the treaty unless the treaty is *modified* in accordance with its wishes. In that case, the "conditional declaration" is indeed a reservation and must meet the corresponding conditions for the permissibility of reservations.

(10) According to the other view, which was ultimately adopted by the Commission, conditional interpretative declarations must be considered from the very outset to be reservations. Once a State that makes a declaration makes its consent to be bound by a treaty subject to a specific interpretation of its provisions, there and then it excludes any other interpretation, whether correct or incorrect, and this must, from the outset, be viewed as a reservation. By prohibiting all reservations, article 309 of the 1982 United Nations Convention on the Law of the Sea makes it impossible for a State to make its acceptance of the Convention subject to a given interpretation of one or the other of its provisions. For example, when expressing its consent to be bound, if a State wishes to say that in its view, a given island is a rock in the sense of article 121, paragraph 3, of the Convention, it may do so through a simple interpretative declaration, but if it makes its participation in the Convention subject to the acceptance of this interpretation, that would constitute a reservation that must be treated as such, and in this case, guideline 3.5.1 would apply.

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[447] *Multilateral Treaties* ... footnote 341 above, chap. IV.4.

(11) Furthermore, the problem remains largely theoretical. Even from the standpoint of the minority position,[448] where a treaty prohibits the formulation of interpretative declarations, a conditional interpretative declaration that proposes the "correct" interpretation must logically be considered impermissible, but the result is exactly the same: the interpretation of the author of the declaration is accepted (otherwise, the conditional declaration would not be an interpretative declaration). Thus, the permissibility or impermissibility of the conditional interpretative declaration as an interpretative declaration has no practical effect. Whether or not it is permissible, the proposed interpretation is identical with the authoritative interpretation of the treaty.

(12) The question of whether a conditional interpretative declaration meets the conditions for the permissibility of an interpretative declaration does not actually affect the interpretation of the treaty. However, in the event that the conditional interpretative declaration actually "behaves like" a reservation, the question of whether it meets the conditions for the permissibility of reservations does have a real impact on the content (and even the existence) of treaty relations.

(13) In light of these observations, there is no reason to subject conditional interpretative declarations to the same conditions for permissibility as "simple" interpretative declarations. Instead, they are subject to the conditions for the permissibility of reservations, as in the case of conditions for formal validity.[449]

(14) In conformity with the decision adopted by the Commission at its fifty-fourth session, guideline 3.5.2 and the commentary thereto will be placed in square brackets until the Commission takes a final position on the place conditional interpretative declarations are to occupy in the Guide to Practice.[450]

[3.5.3 Competence to assess the permissibility of a conditional interpretative declaration

The provisions of guidelines 3.2 to 3.2.4 apply, *mutatis mutandis*, to conditional interpretative declarations.][451]

Commentary

(1) In light of the observations concerning the permissibility of conditional interpretative declarations, the rules on competence to assess such permissibility can only be identical to those for the assessment of the permissibility of reservations.

(2) In accordance with the Commission's consistent practice regarding these specific interpretative declarations, and pending its final decision as to whether to maintain the distinction, guideline 3.5.3 has been included in the Guide to Practice only on a provisional basis: hence the square brackets around the text and the commentary thereto.

3.6. Permissibility of reactions to interpretative declarations

Subject to the provisions of guidelines 3.6.1 and 3.6.2, an approval of, opposition to, or recharacterization of, an interpretative declaration shall not be subject to any conditions for permissibility.

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[448] See above, para. (9).

[449] See draft guidelines 2.4.5 to 2.4.8 and 2.4.10 (*Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 502–506; *Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 130 and 131; and *Fifty-ninth Session, Supplement No. 10* (A/59/10), pp. 277–288).

[450] See *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), p. 119, para. (5) of the commentary to guideline 2.4.7.

[451] See above, footnote 145.

Commentary

(1) The question of the permissibility of reactions to interpretative declarations — approval, opposition or recharacterization — must be considered in light of the study of the permissibility of interpretative declarations themselves. Since any State, on the basis of its sovereign right to interpret the treaties to which it is a party, has the right to make interpretative declarations, there seems little doubt that the other contracting parties also have the right to react to these interpretative declarations and that, where appropriate, these reactions are subject to the same conditions for permissibility as those for the declaration to which they are a reaction.

(2) As a general rule, like interpretative declarations themselves, these reactions may prove to be correct or erroneous, but this does not imply that they are permissible or impermissible. Nevertheless, according to guideline 3.5, the same is not true when an interpretative declaration is prohibited by a treaty or is incompatible with a peremptory norm of international law. This is the eventuality envisaged in guidelines 3.6.1 and 3.6.2, which refer, respectively, to the approval of an interpretative declaration and to opposition to such a declaration. This is indicated at the start of guideline 3.6: "Subject to the provisions of guidelines 3.6.1 and 3.6.2 …".

(3) The question of the permissibility of recharacterizations of interpretative declarations should be approached slightly differently. In a recharacterization, the author does not call into question[452] the content of the initial declaration, but rather its legal nature and the regime applicable to it.[453]

(4) The characterization of a reservation or interpretative declaration must be determined objectively, taking into account the criteria that the Commission set forth in guidelines 1.3 and 1.3.1 to 1.3.3. Guideline 1.3 states:

> The character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce.[454]

(5) This "objective" test takes into account only the declaration's potential effects on the treaty *as intended by its author*. In other words:

> "only an analysis of the potential — and objective — effects of the statement can determine the purpose sought. In determining the legal nature of a statement formulated in connection with a treaty, the decisive criterion lies in the effective result that implementing the statement has (or would have). If it modifies or excludes the legal effect of the treaty or certain of its provisions, it is a reservation "however phrased or named"; if the statement simply clarifies the meaning or scope

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[452] It may *simultaneously* call into question and object to the content of the recharacterized declaration by making an objection to it; in such cases, however, the recharacterization and the objection remain conceptually different from one another. In practice, States almost always combine the recharacterization with an objection to the reservation. It should be borne in mind, however, that recharacterizing an interpretative declaration as a reservation is one thing and objecting to the reservation thus "recharacterized" is another. Nonetheless, it should be noted that even in the case of a reservation that is "disguised" (as an interpretative declaration) — which, from a legal standpoint, has always been a reservation — the rules of procedure and formulation as set out in the present Guide to Practice remain fully applicable. This clearly means that a State wishing to formulate a recharacterization and an objection must abide by the procedural rules and time periods applicable to objections. This is why it is specified, in the second paragraph of draft guideline 2.9.3, that that State should accordingly treat the recharacterized declaration as a reservation.

[453] See the commentary to guideline 2.9.3, para. (5) (*Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), pp. 267–268).

[454] For the draft guideline and the commentary thereon, see *Yearbook ... 1999*, vol. II, Part Two, p. 107.

that its author attributes to the treaty or certain of its provisions, it is an interpretative declaration."[455]

(6) Without prejudice to the effects of these unilateral statements, it is clear that they are an important factor in determining the legal nature of the initially formulated act: in order to determine whether such statements constitute interpretative declarations or reservations, they must be taken into account as expressing the position of parties to a treaty on the nature of the "interpretative declaration" or "reservation", with all the consequences that this entails. Nevertheless, the author of a recharacterization is simply expressing its opinion on this matter. That opinion may prove to be justified or unjustified when the test of guideline 1.3 is applied, but this in no way implies that the recharacterization is permissible or impermissible; these are two different questions.

(7) Recharacterizations, whether justified or unjustified, are not subject to criteria for permissibility. Abundant State practice[456] shows that contracting parties consider themselves entitled to make such declarations, often in order to ensure the integrity of the treaty or in response to treaty-based prohibitions of reservations.[457]

3.6.1. Permissibility of approvals of interpretative declarations

An approval of an impermissible interpretative declaration is itself impermissible.

Commentary

(1) In approving an interpretative declaration, the author expresses agreement with the interpretation proposed and, in so doing, conveys its own point of view regarding the interpretation of the treaty or of some of its provisions. Thus, a State or international organization which formulates an approval does exactly the same thing as the author of the interpretative declaration.[458] It is difficult to see how this reaction could be subject to different conditions of permissibility than those applicable to the initial act.

(2) Furthermore, the relationship between an interpretation and its acceptance is mentioned in article 31, paragraph 3 (a), of the Vienna Conventions, which speak of "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions".[459]

(3) Guideline 3.6.1 therefore simply transposes the rules applicable to interpretative declarations to the approval of such declarations – with implicit reference to guideline 3.5.

(4) The fact remains, however, that the question of whether the interpretation proposed by the author of the interpretative declaration, on the one hand, and accepted by the author of the approval, on the other, is the "right" interpretation and, as such, is capable of producing the effects desired by the key players in relation both to themselves and to other parties to the treaty[460] is different from that of the permissibility of the declaration and the

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[455] *Ibid.*, *loc. cit.*, paragraph (3) of the commentary on draft guideline 1.3.1.

[456] See, *inter alia*, the commentary to guideline 2.9.3, para. (4) (*Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), pp. 264–267.

[457] For a particularly telling example, see the reactions of several States to the Philippines' "interpretative declaration" to the 1982 United Nations Convention on the Law of the Sea (*Multilateral Treaties ...* , footnote 341 above, chap. XXI.6).

[458] See also the commentary to guideline 2.9.1, paras. (4) to (6) (*Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), pp. 255–256; see also Monika Heymann's position (*op. cit.*, footnote 423, pp. 119–123).

[459] See the commentary to guideline 2.9.1, para (5), *ibid.*, p. 255.

[460] This question must be considered, in particular, in the context of article 41 of the Vienna Conventions

approval. The first of these questions is covered in the section of the Guide to Practice on the effects of interpretative declarations.

3.6.2. Permissibility of oppositions to interpretative declarations

An opposition to an interpretative declaration is impermissible to the extent that it does not comply with the conditions for permissibility of an interpretative declaration set forth in guideline 3.5.

Commentary

(1) The permissibility of a negative reaction — an opposition[461]— to an interpretative declaration is no more predicated upon respect for any specific criteria than is that of interpretative declarations or approvals.

(2) This conclusion is particularly evident in the case of opposition expressed through the formulation of an interpretation different from the one initially proposed by the author of the interpretative declaration. There is no reason to subject such a "counter-interpretative declaration", which simply proposes an alternative interpretation of the treaty or of some of its provisions, to different criteria and conditions for permissibility than those for the initial interpretative declaration. While it is clear that in the event of a conflict, only one of the two interpretations, at best,[462] could prevail, both interpretations should be presumed permissible unless, at some point, it becomes clear to the key players that one interpretation has prevailed. In any event, the question of whether one of them, or neither of them, actually expresses the "correct" interpretation of the treaty is a different matter and has no impact on the permissibility of such declarations. This subject is also covered in the section of Part 4 of the Guide to Practice on the effects of interpretative declarations.

(3) This is also true in the case of simple opposition, where the author merely expresses its refusal of the interpretation proposed in an interpretative declaration without proposing another interpretation that it considers more "correct". One might take the view, however, that in a situation of this type, no problem of permissibility arises; the wording chosen for guideline 3.6.2 leaves the question open.

4. Legal effects of reservations and interpretative declarations

Commentary

(1) The fourth part of the Guide to Practice covers the effects of reservations, acceptances and objections, to which the effects of interpretative declarations and reactions thereto (approval, opposition, recharacterization or silence) should also be added. This part follows the logic of the Guide to Practice, in which an attempt is made to present, as systematically as possible, all the legal issues concerning reservations and related unilateral declarations, as well as interpretative declarations: after defining the issues (in the first part of the Guide) and establishing the rules for assessing the validity (second part of the Guide) and permissibility (third part of the Guide) of these various declarations, the fourth part is

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(Agreements to modify multilateral treaties between certain of the parties only).

[461] See draft guideline 2.9.2 and the commentary thereto (*Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), pp. 256–263).

[462] In fact, it is not impossible that a third party might not agree with either of the interpretations proposed individually and unilaterally by the parties to the treaty if, through the application of methods of interpretation, it concludes that another interpretation arises from the provisions of the treaty. See, for example, *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, Judgment of 27 August 1952, *I.C.J. Reports 1952*, p. 211.

concerned with determining the legal effects of the reservation or interpretative declaration.[463]

(2) First of all, it is worth recalling a point that is crucial to understanding the legal effects of a reservation or interpretative declaration. Both of these instruments are defined in relation to the legal effects that their authors intend them to have on the treaty. Accordingly, guideline 1.1 (Definition of reservations) provides as follows:

> "Reservation" means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.[464]

(3) In the same spirit, guideline 1.2 (Definition of interpretative declarations) states that:

> "Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.[465]

(4) Although the potential legal effects of a reservation or interpretative declaration are thus a "substantive element"[466] of its definition,[467] this does not at all mean that a reservation or interpretative declaration actually produces those effects. The fourth part of the Guide is not intended to determine the effects that the author of a reservation or the author of an interpretative declaration purported it to have – this issue was dealt with in the first part on the definition and identification of reservations and interpretative declarations. The fourth part, in contrast, deals with determining the legal effects that reservations and interpretative declarations actually produce in relation to eventual reactions from other contracting States or contracting organizations.[468] The purported effects and the actual effects are not necessarily identical and depend on the one hand on the validity and

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[463] The fifth and final part of the Guide to Practice will address the succession of States in relation to reservations.

[464] *Yearbook ... 1998*, vol. II, Part Two, p. 99.

[465] *Yearbook ... 1999*, vol. II, Part Two, p. 97.

[466] *Yearbook ... 1998*, vol. II, Part Two, p. 94, para. 500. It is generally recognized that the function of reservations is to purport to produce legal effects. Frank Horn maintains that the fact that reservations purport to produce certain specific legal effects is the main criterion of this type of unilateral act (*op. cit.*, footnote 321 above, p. 41). See also the statements of Mr. Ruda and Mr. Rosenne, who emphasized the close link between the definition of the reservation and the legal effects that it is likely to produce (*Yearbook ... 1965*, vol. I, 799th meeting, 19 June 1965, p. 167, para. 46, and 800th meeting, 11 June 1965, p. 171, para. 8).

[467] For a definition of reservations in general, see draft guidelines 1.1, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), pp. 196–199 and 1.1.1 (*ibid., Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 210–217).

[468] Several of the guidelines previously adopted and the commentaries thereto use, for the sake of convenience, the expression "contracting parties" to mean both contracting States and contracting organizations (see in particular guidelines 1.4.5, 2.3.1 to 2.3.4, 2.4.6, [2.4.8] and the model provisions annexed to guideline 2.5.8). In the Commission's view, this is a deceptive convenience which merges incompatible definitions of the expressions "contracting State" and "contracting organization" given in article 2, paragraph 1 (f), of the 1986 Vienna Convention with the definition of "party" given in subparagraph (g) of the same provision. In order to avoid this confusion, the Commission proposes to substitute the expression "contracting State(s) and contracting organization(s)" for "contracting party(ies)" each time the latter expression appears in the Guide to Practice.

permissibility of the reservations and interpretative declarations and, on the other hand, on the reactions of other interested States or international organizations.

(5) Despite the relevant provisions set out in the Vienna Conventions, the effects of a reservation or of an acceptance of or objection to a reservation remain one of the most controversial issues of treaty law. Article 21 of the two conventions refers exclusively to the "legal effects of reservations and of objections to reservations". The drafting of this provision was relatively simple compared to that of the other provisions on reservations. Neither the International Law Commission nor the United Nations Conference on the Law of Treaties, held at Vienna in 1968 and 1969, seem to have had any particular difficulty in formulating the rules presented in the first two paragraphs of article 21 concerning the effects of reservations (whereas paragraph 3 deals with the effects of objections).

(6) The Commission's first Special Rapporteur on the law of treaties, Brierly, had already suggested in his draft article 10, paragraph 1, that a reservation should be considered as:

> "limiting or varying the effect of [a] treaty in so far as concerns the relation of [the] State or organization [author of the reservation] with one or more of the existing or future parties to the treaty".[469]

(7) Fitzmaurice made the first proposal for a separate provision on the legal effects of a reservation, which largely prefigured the first two paragraphs of the current article 21.[470] It is interesting that these draft provisions seemed to smack of the obvious: Fitzmaurice did not make any comment on the draft and noted only that "it is considered useful to state these consequences, but they require no explanation".[471]

(8) At the outset, Waldock suggested a provision on the effects of a reservation deemed "admissible",[472] and since then his proposal has undergone only minor drafting changes.[473] Neither Waldock[474] nor the Commission considered it necessary to comment at length on that rule, the Commission merely stating that:

> These rules, which appear not to be questioned, follow directly from the consensual basis of the relations between parties to a treaty.[475]

(9) Nor did the issue give rise to observations or criticisms from States between the two readings by the Commission or at the Vienna Conference.

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[469] [First] Report on the law of treaties, A/CN.4/23, *Yearbook of the International Law Commission, 1950*, vol. II, p. 238.

[470] Report on the law of treaties, A/CN.4/101, *Yearbook ... 1956*, vol. II, pp. 115–116.

[471] *Ibid.*, p. 127, para. 101.

[472] This is the term that was used in draft article 18, paragraph 5, as presented in Waldock's first report (A/CN.4/144), *Yearbook ... 1962*, vol. II, p. 61.

[473] The text proposed by Waldock for article 18, paragraph 5, became article 18 *ter*, devoted entirely to the legal effect of reservations, with a few editorial changes from the Drafting Committee (see *Yearbook ... 1962*, vol. I, 664th meeting, 19 June 1962, p. 234, para. 63). Subsequently, the Drafting Committee made other changes to the draft (*ibid.*, 667th meeting, 25 June 1962, p. 253, para. 71). It ultimately became article 21, as adopted by the Commission on first reading in 1962 (*ibid.*, vol. II, p. 181). The text underwent changes made necessary by the rephrasing of other provisions on reservations. The changes were purely editorial, except for the change to subparagraph 1 (b) (on this point, see para. (34) of the commentary to guideline 4.2.4).

[474] A/CN.4/144, *Yearbook ... 1962*, vol. II, p. 68, para. 21.

[475] See the Commission's commentary in 1962 (*Yearbook ... 1962*, vol. II, p. 181 (commentary to article 21)) and the commentary to draft article 19 adopted on second reading in 1965 (*Yearbook ... 1966*, vol. II, p. 209, para. 1).

(10) The drafting of the current article 21, paragraph 3, posed greater difficulties. This provision, logically absent from Sir Humphrey's first proposals (which precluded any treaty relations between a reserving State and an objecting State[476]) had to be included in the article on the effects of reservations and objections when the Commission accepted that a State objecting to a reservation could nevertheless establish treaty relations with the author of the reservation.[477] A proposal by the United States of America to that effect convinced Sir Humphrey of the logical need for such a provision,[478] but its drafting by the Commission was nevertheless time-consuming.[479] The Conference made only a relatively minor change in order to harmonize paragraph 3 with the reversal of the presumption of article 20, paragraph 4 (b).[480]

(11) The resumed consideration of article 21 during the drafting of the 1986 Vienna Convention did not pose any significant difficulties. During the very brief discussion of draft article 21, two members of the Commission emphasized that the provision in question "followed logically" from draft articles 19 and 20.[481] Even more clearly, Mr. Calle y Calle stated that:

> "if reservations were admitted, their legal effect was obviously to modify the relations between the reserving party and the party with regard to which the reservation was established".[482]

(12) The Commission, and then several years later the Vienna Conference, adopted article 21 with only the drafting changes required by the broader scope of the 1986 Convention.

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[476] Sir Humphrey Waldock, Fourth report on the law of treaties, A/CN.4/177 and Add.1 and 2, *Yearbook ... 1965*, vol. II, p. 56, para. 3.

[477] See Daniel Müller's commentary on article 21 (1969), footnote 396 above, p. 888, paragraphs 7 and 8.

[478] Fourth report on the law of treaties, A/CN.4/177 and Add.1, *Yearbook ... 1965*, vol. II, pp. 47 and 55. See also the comments of the Danish Government (*ibid.*, p. 46).

[479] Although Waldock considered that the case of a reservation to which a simple objection had been made was "not altogether easy to express" (*Yearbook ... 1965*, vol. I, 813th meeting, 29 June 1965, p. 270, para. 96), most of the members (see Mr. Ruda (*ibid.*, para. 13); Mr. Ago (*ibid.*, 814th meeting, 29 June 1965, p. 271, paras. 7 and 11); Mr. Tunkin (*ibid.*, para. 8) and Mr. Briggs (*ibid.*, p. 272, para. 14)) were convinced that it was necessary, and even "indispensable" (Mr. Ago, *ibid.*, p. 271, para. 7) to introduce a provision on that subject "in order to forestall ambiguous situations" (*ibid.*, p. 271, para. 7). However, members had different opinions as to the basis of the paragraph proposed by the United States and the Special Rapporteur: whereas Waldock's proposal emphasized the consensual basis of the treaty relationship established despite the objection, the paragraph proposed by the United States seemed to suggest that the intended effect originated only from the unilateral act of the objecting State, that is, from the objection, without the reserving State having a real choice. The two positions had their supporters within the Commission (see the positions of Mr. Yasseen (*ibid.*, 800th meeting, 11 June 1965, p. 171, para. 7 and pp. 172 and 173, paras. 21–23 and 26), Mr. Tunkin (*ibid.*, 800th meeting, 11 June 1965, p. 172, para. 18) and Mr. Pal (*ibid.*, para. 24) and those of Mr. Waldock (*ibid.*, p. 173, para. 31), Mr. Rosenne (*ibid.*, p. 172, para. 10) and Mr. Ruda (*ibid.*, p. 172, para. 13)). The text that the Commission finally adopted on an unanimous basis (*ibid.*, 816th meeting, 2 July 1965, p. 284), however, is very neutral and clearly shows that the issue was left open by the Commission (see also the Special Rapporteur's summing-up, *ibid.*, 800th meeting, 11 June 1965, p. 173, paragraph 31).

[480] *United Nations Conference on the Law of Treaties, Second Session, Summary records* (A/CONF.39/11/Add.1), footnote 339 above, 33rd plenary meeting, 21 May 1969, p. 181.

[481] Cf. Mr. Tabibi, *Yearbook ... 1977*, vol. I, 1434th meeting, 6 June 1977, p. 98, para. 7; Mr. Dadzie, *ibid.*, p. 99, para. 18.

[482] *Ibid.*, p. 98, para. 8.

(13) One might think that the widespread acceptance of article 21 during adoption of the draft articles on the law of treaties between States and international organizations or between international organizations showed that the provision was even then accepted as reflecting international custom on the subject. The arbitral ruling made in the case concerning *Delimitation of the Continental Shelf between France and the United Kingdom of Great Britain and Northern Ireland* corroborates this analysis. The Court of Arbitration recognized that:

> "the law governing reservations to multilateral treaties was then undergoing an evolution which crystallized only in 1969 in Articles 19 to 23 of the Vienna Convention on the Law of Treaties".[483]

(14) Nevertheless, the effects of a reservation, acceptance or objection are by no means fully addressed by article 21 of the 1969 and 1986 Vienna Conventions. This provision concerns only the effect of those instruments on the content of the treaty relationship between the reserving party and the other contracting States and contracting organizations.[484] The separate issue of the effect of the reservation, acceptance or objection on the consent of the reserving party to be bound by the treaty is covered not by article 21 of the two Vienna Conventions, but by article 20, entitled "Acceptance of and objection to reservations".

(15) This provision, which is the result of draft article 20 adopted by the Commission on first reading in 1962, entitled "The effects of reservations",[485] was nevertheless incorporated in 1965 in the new draft article 19, entitled "Acceptance of and objection to reservations"[486] (which later became article 20 of the 1969 Vienna Convention), after

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[483] *United Nations, Reports of International Arbitral Awards*, vol. XVIII, p. 32, para. 38.

[484] See below commentary to draft guideline 4.2.4.

[485] The draft guideline read as follows:

> "1. (a) A reservation expressly or impliedly permitted by the terms of the treaty does not require any further acceptance.
>
> (b) Where the treaty is silent in regard to the making of reservations, the provisions of paragraphs 2 to 4 below shall apply.
>
> 2. Except in cases falling under paragraphs 3 and 4 below and unless the treaty otherwise provides:
>
> (a) Acceptance of a reservation by any State to which it is open to become a party to the treaty constitutes the reserving State a party to the treaty in relation to such State, as soon as the treaty is in force;
>
> (b) An objection to a reservation by a State which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the objecting and the reserving State, unless a contrary intention shall have been expressed by the objecting State.
>
> 3. Except in a case falling under paragraph 4 below, the effect of a reservation to a treaty which has been concluded between a small group of States shall be conditional upon its acceptance by all the States concerned unless:
>
> (a) The treaty otherwise provides; or
>
> (b) The States are members of an international organization which applies a different rule to treaties concluded under its auspices.
>
> 4. Where the treaty is the constituent instrument of an international organization and objection has been taken to a reservation, the effect of the reservation shall be determined by decision of the competent organ of the organization in question, unless the treaty otherwise provides."

[486] *Yearbook ... 1965*, vol. II, p. 162.

significant reworking out of concern for clarity and simplicity.[487] In the context of that reworking, the Commission also decided to abandon the link between objections and the conditions for permissibility of a reservation, including its compatibility with the object and purpose of the treaty.

(16) At the Vienna Conference, the first paragraph of this provision underwent substantial amendment,[488] and paragraph 4 (b) was then altered by a Soviet amendment.[489] This latter amendment was very significant as it reversed the presumption of article 4 (b): any objection would in future be considered a simple objection unless its author had clearly expressed an intention to the contrary. Furthermore, despite the inappropriate title of article 20, it is clear from the origin of this provision that it was intended to cover, *inter alia*, the effects of a reservation, of the acceptance thereof and of any objections to that reservation.

(17) Nevertheless, articles 20 and 21 of the Vienna Convention have some unclear elements and some gaps. In State practice, the case contemplated in article 21, paragraph 3, namely objections with minimum effect, is no longer viewed as "unusual",[490] as the Commission had initially envisaged; on the contrary, owing to the presumption of article 20, paragraph 4 (b), it has become the most frequent type of objection.

(18) The practice of States is not limited to recourse to the effects set out in paragraph 3. They are increasingly trying to have their objections produce different effects. The absence of a firm position on the part of the Commission, which intentionally opted for a neutral solution that was acceptable to everyone, far from resolving the problem, created others that should be resolved in the Guide to Practice.

(19) Nor do articles 20 and 21 answer the question of what effects are produced by a reservation that does not meet the conditions of permissibility set out in article 19 or of formal validity (contained in article 23 and elsewhere). In other words, neither article 20 nor article 21 set out the consequences of the invalidity of a reservation, at least not expressly. It is also of particular concern that the application of paragraph 3 on the combined effects of a reservation and an objection is not limited to cases of permissible reservations — that is, reservations established in accordance with article 19, unlike the case set out in paragraph 1. The very least that can be said is that "Article 21 is somewhat obscure".[491]

(20) Under these conditions, the Commission considered it necessary to draw a distinction between the rules applying to the legal effects of a valid reservation (see sections 4.1 to 4.4 of the fourth part of the Guide to Practice), which are set out — at least partially — in the two Vienna Conventions, and those concerning the legal effects of an invalid reservation (see section 4.5).

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[487] See Sir Humphrey Waldock, Fourth report on the law of treaties (A/CN.4/177 and Add.1 and 2), *Yearbook ... 1965*, vol. II, p. 50, paras. 4 and 5.

[488] See the amendments by Switzerland (A/CONF.39/C.1/L.97), France and Tunisia (A/CONF.39/C.1/L.113) and Thailand (A/CONF.39/C.1/L.150). These amendments were adopted by a large majority (*United Nations Conference on the Law of Treaties, First Session, Summary records* (A/CONF.39/11), footnote 313 above, 25th meeting, 16 April 1968, p. 135, para. 30).

[489] A/CONF.39/L.3, *United Nations Conference on the Law of Treaties, Documents of the Conference* (A/CONF.39/11/Add.2), footnote 313 above, pp. 265–266. This amendment was adopted by 49 votes to 21, with 30 abstentions (*United Nations Conference on the Law of Treaties, Second Session, Summary records* (A/CONF.39/11), footnote 339 above, 10th plenary meeting, 29 April 1969, p. 35, para. 79). See also D. Müller, "Article 20 (1969)", footnote 324 above, pp. 806–807, para. 14.

[490] Fourth report on the law of treaties, A/CN.4/177 and Add.1, *Yearbook ... 1965*, vol. II, p. 55.

[491] G. Gaja, footnote 364 above, p. 330.

(21). The silence of the Vienna Conventions on the matter of interpretative declarations[492] extends, obviously, to the effects of such declarations, which are covered in the seventh section of the present part of the Guide to Practice.

4.1 Establishment of a reservation with regard to another State or organization

A reservation formulated by a State or an international organization is established with regard to a contracting State or a contracting organization if it is permissible and was formulated in accordance with the required form and procedures, and if that contracting State or contracting organization has accepted it.

Commentary

(1) The legal effects of a permissible reservation depend to a large extent on the reactions that it has received. A permissible and accepted reservation has different legal effects to those of a permissible reservation to which objections have been made. Article 21 of the Vienna Conventions establishes this distinction clearly. In its 1986 version, which is fuller in that it includes the effects of reservations and reactions from international organizations:

> "1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:
>
> (a) Modifies for the reserving State or international organization in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and
>
> (b) Modifies those provisions to the same extent for that other party in its relations with the reserving State or international organization.
>
> 2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.
>
> 3. When a State or an international organization objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State or organization, the provisions to which the reservation relates do not apply as between the reserving State or organization and the objecting State or organization to the extent of the reservation."

(2) While paragraph 1 of this provision concerns the legal effects of an "established" reservation, a concept that should be clarified, paragraph 3 covers the legal effects of a reservation to which an objection has been made. A distinction should therefore be drawn between the case of a permissible and accepted reservation — that is, an "established" reservation — and that of a permissible reservation[493] to which an objection has been made.

(3) Some members of the Commission expressed hesitation regarding the chosen terminology, which in their view could introduce an element of confusion by unnecessarily and artificially creating a new category of reservations, because the Vienna Conventions had not defined an "established reservation". Nevertheless, the Commission considered that the concept was found in article 21, paragraph 1, of the Vienna Conventions, which, while not creating a specific category of reservation, was of great significance for defining the effects of reservations. It would therefore be useful, at least, to endeavour to clarify the

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[492] *Yearbook ... 1999*, vol. II, Part Two, p. 97.

[493] It should be noted that paragraph 3 of article 21 does not refer only to a valid reservation which has been the subject of an objection. It cannot therefore be excluded, *a priori*, that this provision also applies to the case of an objection to an invalid reservation.

meaning of the term in the introductory section of the Guide to Practice covering the effects of reservations.

(4) According to the *chapeau* of article 21, paragraph 1, only a reservation that has been established — in accordance with the provisions of articles 19, 20 and 23 — has the legal effects set out in subparagraphs (a) and (b) of that paragraph. As for the scope of application of article 21, paragraph 1, the Vienna Conventions merely make a rather clumsy reference to provisions concerning the permissibility of a reservation (art. 19), consent to a reservation (art. 20) and the form of a reservation (art. 23), without explaining the interrelation of those provisions in greater detail. It therefore seems appropriate to define what is meant by an "established" reservation within the meaning of article 21, paragraph 1, before considering the legal effects it produces.

(5) Under the terms of the *chapeau* of article 21 of the Vienna Conventions, a reservation is established "with regard to another party in accordance with articles 19, 20 and 23". The phrase, which at first appears clear and is often understood as referring to permissible reservations accepted by a contracting State or contracting organization, contains many uncertainties and imprecisions which are the result of a significant recasting undertaken by the Commission during the second reading of the draft articles on the law of treaties in 1965, on the one hand, and changes introduced to article 20, paragraph 4 (b), of the Convention during the Vienna Conference in 1969.

(6) First of all, the reference to article 23 as a whole poses a problem, since the provisions of article 23, paragraphs 3 and 4, have no effect on the establishment of a reservation. They concern only its withdrawal and the fact that, in certain cases, the formulation of an acceptance or an objection does not require confirmation.

(7) Secondly, it is difficult — indeed, impossible — to determine what connection might exist between the establishment of a reservation and the effect on the entry into force of the treaty of an objection provided for in article 20, paragraph 4 (b). The objection cannot be considered as consent to the reservation since it in fact aims to "exclude or to modify the legal effects of the reservation, or to exclude the application of the treaty as a whole, in relations with the reserving State or organization".[494] Accordingly, a reservation to which an objection has been made is obviously not established within the meaning of article 21, paragraph 1.

(8) Consultation of the *travaux préparatoires* provides an explanation for this "contradiction". In the draft articles adopted by the Commission, which contained in article 19 (later article 21) the same reference, the presumption of article 17 (future article 20, paragraph 4 (b)) established the principle that a treaty did not enter into force between a reserving State and a State which had made an objection. Since the treaty was not in force, there was no reason to determine the legal effects of the reservation on the content of treaty relations. Moreover, the comments of the Commission specified: "Paragraphs 1 and 2 of this article set out the rules concerning the legal effects of a reservation which has been established under the provisions of articles 16, 17 and 18, assuming that the treaty is in force."[495] The "contradiction" was introduced only during the Conference through the reversal of the presumption of article 20, paragraph 4 (b), following the adoption of the Soviet amendment.[496] Because of this new presumption, a treaty does remain in force for

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[494] See guideline 2.6.1 (Definition of objections to reservations), *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), pp. 186–201.

[495] *Yearbook ... 1966*, vol. II, p. 209, para. (1) of the commentary to article 19 (italics added).

[496] See paragraph (16) above of the introduction to the fourth part of the Guide to Practice and, in particular, note 439 above.

the reserving State even if a simple objection is formulated. However, this could not mean that the reservation is established under article 21.

(9) In his first report on the law of treaties, Sir Humphrey Waldock took into account the condition of consent to a reservation for it to be able to produce its effects. The draft article 18 that he proposed to devote to "Consent to reservations and its effects" specified that:

> "A reservation, since it purports to modify the terms of the treaty as adopted, shall only be effective against a State which has given, or is presumed to have given, its consent thereto in accordance with the provisions of the following paragraphs of this article."[497]

(10) In its advisory opinion on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, the International Court of Justice also highlighted this basic principle of the law of reservations, and of treaty law as well:

> "It is well established that in its treaty relations a State cannot be bound without its consent and that consequently no reservation can be effective against any State without its agreement thereto."[498]

(11) It is this idea to which paragraph 1 of article 21 of the Vienna Conventions refers, and this is the meaning that must be given to the reference to article 20.

Consent to the reservation is therefore a *sine qua non* for the reservation to be considered established and to produce its effects. Yet contrary to what has been maintained by certain partisans of the opposability school,[499] consent is not the only condition. The *chapeau* of article 21, paragraph 1, cumulatively refers to consent to the reservation (the reference to article 20), permissibility (art. 19) and formal validity (art. 23). Consent alone is thus not sufficient for the reservation to produce its "normal" effects. Moreover, the reservation must be permissible within the meaning of article 19 and have been so formulated that it complies with the rules of procedure and form set forth in article 23. Only this combination can "establish" the reservation. This was the position taken by the Inter-American Court of Human Rights in its advisory opinion of 24 September 1982 concerning *The effect of reservations on the entry into force of the American Convention on Human Rights*, which concluded from its examination of the Vienna system (to which article 75 of the Pact of San José directly refers) that "States ratifying or adhering to the Convention may do so with any reservations *that are not incompatible with its object and purpose*";[500]

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[497] *Yearbook ... 1962*, vol. II, p. 61.

[498] Advisory Opinion of 28 May 1951, *I.C.J. Reports 1951*, footnote 305 above, p. 17. See also D. Müller, footnote 396 above, pp. 809–811, paras. 20–24.

[499] In contrast to the "permissibility" school. On these two schools, see the introductory commentary to Part 3 of the Guide to Practice (Validity of reservations and interpretative declarations), paragraph (3), *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), p. 325. See also the First report on the law and practice relating to reservations to treaties, A/CN.4/470, *Yearbook ... 1995*, pp. 158–9; Jean Kyongun Koh, "Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision", *International Law Journal*, 1982, pp. 71–116; C. Redgwell, footnote 343 above, pp. 263–269; R. Riquelme Cortado, footnote 343 above, pp. 73–82; Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester University Press, 1984), p. 81, note 78; and Alain Pellet, "Article 19 (1969)", in Olivier Corten and Pierre Klein (eds.) *op. cit.*, footnote 396 above, pp. 696–699, paras. 111–118.

[500] Inter-American Court of Human Rights, *The effect of reservations on the entry into force of the American Convention on Human Rights* (arts. 74 and 75), advisory opinion of 24 September 1982, Series A, No. 2, para. 26 – emphasis added. The Court, referring to the specific nature of the Convention, nevertheless held that reservations to the Convention "do not require acceptance by the

the Court also found that the Convention implied the acceptance of all the reservations that were not incompatible with its object and purpose.

(12) This necessary combination of validity and consent results also from the phrase in article 21, paragraph 1, which states that a reservation is established "with regard to another party". Logically, a reservation cannot be valid only with regard to another party. Either it is valid or it is not. This is a question that is not in principle subject to the will of the other contracting States or contracting organizations[501] unless, of course, they decide by common agreement to "permit" the reservation.[502] On the other hand, a reservation that is objectively valid is opposable only to the States or organizations that have, in one way or another, consented to it. It is a bilateral link which is created, following acceptance, between the reserving State and the contracting State or organization that has consented thereto. The reservation is established only in regard to that party, and it is only in relations with that party that it produces its effects.

(13) As a consequence, it seems necessary to emphasize once again in the Guide to Practice that the establishment of a reservation results from the combination of its validity and of consent. However, the Commission did not consider it appropriate simply to reproduce the *chapeau* of article 21, paragraph 1, which explains the meaning of the term "established reservation" by referring to other provisions of the Vienna Conventions from which it derives. Guideline 4.1 in fact has the same meaning; however, instead of referring to other provisions, it sets out their content: "if it is permissible" corresponds to the reference to article 19;[503] "[if it] was formulated in accordance with the required form and procedures" corresponds to the reference made in article 21, paragraph 1, to article 23;[504] and "if that contracting State or contracting organization has accepted it" corresponds to the reference to article 20.

(14) The formulation of guideline 4.1 differs from the *chapeau* of the first paragraph of article 21 of the Vienna Conventions in another regard: instead of referring to "another party",[505] guideline 4.1 covers cases in which "a reservation ... is established with regard to *a contracting State or contracting organization*". The reason for this is that, while article 21 applies to the actual effects of a reservation and presupposes that the treaty to which the reservation applies has already entered into force, guideline 4.1 merely specifies the conditions under which the reservation will be legally capable of producing the effects intended by its author, if and when the treaty enters into force.

(15) Guideline 4.1 merely sets out the general rule and does not fully answer the question of whether a reservation is established. Article 20 of the Vienna Conventions, paragraph 4 of which specifies the implications, under ordinary law, of consent to a reservation and hence constitutes the cornerstone of the "flexible" Vienna system,[506] does in fact contain exceptions with regard to the expression of consent to the reservation by the other

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States Parties ..." (*ibid.*, para. 37); however, as the Court subsequently noted, that assertion was valid solely in the context of entry into force of the Convention (para. 38 – on this point, see the commentary to guidelines 4.2.2 and 4.2.5 below).

[501] See guideline 3.3.2 [3.3.3].

[502] See guideline 3.3.3 [3.3.4].

[503] See guideline 3.1 (Permissible reservations).

[504] See guidelines 2.1.1 (Written form), 2.1.5 (Communication of reservations) and 2.2.1 (Formal confirmation of reservations formulated when signing a treaty). Generally speaking, this reference to "required procedures" refers to the procedural requirements established in the Vienna Conventions, the Guide to Practice and, in some cases, the treaty to which the reservation applies.

[505] "A reservation established with regard *to another party* in accordance with articles 19, 20 and 23 ...".

[506] See *Yearbook ... 1966*, vol. II, p. 266, para. 21 of the commentary on article 17. See also D.W. Bowett, footnote 363 above, p. 84; D. Müller, footnote 396 above, p. 799, para. 1.

contracting States and contracting organizations. Moreover, paragraph 4 clearly specifies that it applies only in "cases not falling under the preceding paragraphs and unless the treaty otherwise provides". The establishment of the reservation, and particularly the requirement of consent, may thus be modified depending on the nature of the reservation or of the treaty, but also by any provision incorporated in the treaty to that effect. These specific cases in which the consent of the other contracting States and contracting organizations is no longer required, or must be expressed unanimously or collectively, are covered in guidelines 4.1.1, 4.1.2 and 4.1.3.

(16) The words "with regard to a[nother] contracting State or [another] [international] organization", which appear in both the body and title of guideline 4.1, aim to make it clear that this provision refers to the usual situation in which the establishment of the reservation produces only relative effects, between the author of a reservation and the State or international organization that has accepted the reservation, in contrast to the specific situations in which acceptance by another contracting State or another contracting international organization is not required in order for the reservation to produce its effects, which are covered by guidelines 4.1.1, 4.1.2 and 4.1.3.

(17) Article 21, paragraph 2, of the Vienna Conventions does not, strictly speaking, concern the legal effects of a reservation, but rather deals with the absence of any legal effect of a reservation on the legal relations between contracting States and contracting organizations other than the author of the reservation, regardless of whether the reservation is established or valid. This matter is dealt with in section 4.6 of the Guide to Practice, which covers the effects of reservations on treaty relations between the other contracting States and contracting organizations.

4.1.1 Establishment of a reservation expressly authorized by a treaty

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States and contracting organizations, unless the treaty so provides.

2. A reservation expressly authorized by a treaty is established with regard to the other contracting States and contracting organizations if it was formulated in accordance with the required form and procedures.

Commentary

(1) Guideline 4.1.1 presents the exception to the general rule concerning the establishment of reservations contained in article 20, paragraph 1, of the Vienna Conventions while establishing a link to the term "established reservation". Indeed, since a reservation expressly authorized by the treaty is, by definition, permissible and accepted by the contracting States and contracting organizations, making it in a way that respects the rules applicable to the formulation and communication of reservations is all that is required to establish it. This makes it binding on all the contracting States and contracting organizations.

(2) According to article 20, paragraph 1, of the Vienna Conventions, expressly authorized reservations need not be accepted "subsequently" by the other contracting States and contracting organizations. However, this paragraph does not mean that the reservation is exempt from the requirement of the contracting States' and contracting organizations' assent; it simply expresses the idea that, since the parties have given their assent even before the formulation of the reservation, and have done so in the text of the treaty itself, any subsequent acceptance is superfluous. Moreover, the expression "unless the treaty so

provides" which appears in the text of this provision[507] clearly calls for such an interpretation. Only reservations that are actually covered by this prior agreement do not require subsequent acceptance, and are thus, logically established from the moment they are permissibly made.[508]

(3) The draft articles adopted by the Commission on second reading in 1966 did not restrict the possibility of acceptance solely to reservations "expressly" authorized by the treaty, but also included reservations "impliedly" authorized, but the work of the Commission sheds no light on the meaning to be attributed to this concept.[509] At the Vienna Conference, a number of delegations expressed their doubts regarding this solution[510] and proposed amendments aimed at deleting the words "or impliedly",[511] and the change was accepted.[512] Sir Humphrey Waldock, Expert Consultant at the Conference, had himself recognized that "the words 'or impliedly' in article 17, paragraph 1, seemed to have been retained in the draft articles as a relic from earlier and more detailed drafts which dealt with implied prohibition and implied authorization of reservations".[513] It is thus with good reason that reservations implicitly authorized by the treaty are not mentioned in article 20, paragraph 1.

(4) Had it been held, as was suggested,[514] that where a treaty prohibits certain reservations or certain categories of reservations, it *ipso facto* authorizes all others, which amounts to a reversal of the presumption of article 19 (b), this interpretation would clearly place article 20, paragraph 1, in direct contradiction to article 19. Assuming this to be the case, the inclusion in the treaty of a clause prohibiting reservations to a specific provision would suffice to institute total freedom to make any reservation whatsoever other than those that were expressly prohibited; the criterion of the object and purpose of the treaty would then be rendered inapplicable.[515] The Commission has already ruled out this interpretation in guideline 3.1.3 (Permissibility of reservations not prohibited by the treaty), which makes it clear that reservations not prohibited by the treaty are not *ipso facto* permissible and

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[507] The words "unless the treaty so provides" were added by the Special Rapporteur, Sir Humphrey Waldock, in order to take account of "the possibility ... that a treaty may specifically authorize reservations but on condition of their acceptance by a specified number or fraction of the parties" (Fourth report on the law of treaties, A/CN.4/177 and Add.1 and 2, *Yearbook ... 1965*, vol. II, p. 50). This wording was slightly modified by the Drafting Committee (*ibid.*, vol. I, 813th meeting, 29 June 1965, p. 265, para. 30). In 1966, the wording was once again slightly modified, but the summary records of the meetings shed no light on the reasons for this change.

[508] "Made", not "formulated", because they produce their effects without any additional formality being required. See the commentary on guideline 3.1 (Permissible reservations), *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), pp. 330 and 331, para. (6).

[509] *Yearbook ... 1966*, vol. II, p. 202 and the commentary, which is not particularly illuminating on this point, p. 207, para. (18).

[510] See the statements by the representatives of India (*Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11), 24th meeting, p. 128, para. 30), the United States (*ibid.*, p. 130, para. 53) and Ethiopia (*ibid.*, 25th meeting, 16 April 1968, p. 134, para. 15).

[511] See the amendments by France and Tunisia (A/CONF.39/C.1/L.113), Switzerland (A/CONF.39/C.1/L.97) and Thailand (A/CONF.39/C.1/L.150) (*Documents of the Conference* (A/CONF.39/11/Add.2), note 488 above, p. 135).

[512] The three amendments aimed at deleting "or impliedly" (see note 511 above) were adopted by 55 votes to 18, with 12 abstentions (*Summary records* (A/CONF.39/11), note 488 above, 25th meeting, 16 April 1968, p. 135, para. 30).

[513] *Ibid.*, 24th meeting, 16 April 1968, pp. 126 and 127, para. 14.

[514] F. Horn, footnote 321 above, p. 132.

[515] See *inter alia* the criticisms by C. Tomuschat, footnote 321 above, p. 475.

hence can with still greater reason not be regarded as established and accepted by the terms of the treaty itself.

(5) By the same token, and despite the lack of precision in the Vienna Conventions on this point, a general authorization of reservations in a treaty cannot constitute *a priori* acceptance on the part of the contracting States and contracting organizations. To say that all the parties have the right to formulate reservations to the treaty cannot imply that this right is unlimited, still less that all reservations so formulated are, by virtue of the simple general clause included in the treaty, "established" within the meaning of the *chapeau* to article 21, paragraph 1. To accept this way of looking at things would render the Vienna regime utterly meaningless. Such general authorizations do no more than refer to the general regime, of which the Vienna Conventions constitute the expression, and which is based on the fundamental principle that the parties to a treaty have the power to formulate reservations.

(6) Nor is the notion of an expressly authorized reservation identical or equivalent[516] to the concept of a specified reservation. This was very clearly established by the arbitral tribunal in the case concerning *Delimitation of the Continental Shelf between France and the United Kingdom of Great Britain and Northern Ireland* in relation to the interpretation of article 12 of the 1958 Geneva Convention on the Continental Shelf, paragraph 1 of which provides that:

> "At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1 to 3 inclusive."

There can be no doubt that, pursuant to this provision, any State may make its consent to be bound by the Geneva Convention subject to the formulation of a reservation so "specified", that is to say any reservation relating to articles 4 to 15, in accordance with article 19 (b) of the Vienna Conventions. This "authorization" does not however imply that any reservation so formulated is necessarily valid,[517] nor, *a fortiori*, that the other parties have consented, under article 12, paragraph 1, to any and every reservation to articles 4 to 15. The Court of Arbitration considered that this provision:

> "cannot be read as committing States to accept in advance any and every reservation to articles other than Articles 1 to 3 ... Such an interpretation ... would amount almost to a license to contracting States to write their own treaty".[518]

(7) State practice supports the solution used by the Court of Arbitration. The fact that 11 States objected to reservations made to this Convention,[519] although those reservations only

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[516] P.-H. Imbert nevertheless maintains that specified reservations are included within the term "expressly authorized reservation". In support of this interpretation he suggests that article 20, paragraph 1, in no way limits the right of contracting States to object to an expressly authorized reservation, but expresses only the idea that the reserving State becomes a contracting party upon the deposit of its instrument of ratification or accession ("La question des réserves dans la décision arbitrale du 30 juin 1977 relative à la délimitation du plateau continental entre la République française et le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord", *Annuaire français de droit international*, 1978, pp. 52–57). He does not deny that this solution openly contradicts the provisions of article 20, but justifies his approach by referring to the work of the Vienna Conference. See also the commentary to guideline 3.1.2, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), pp. 348–349, para. (11).

[517] See on this question guideline 3.1.4 (Permissibility of specified reservations) and the commentary thereto, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), pp. 354–355.

[518] Decision of 30 June 1977, *Reports of International Arbitral Awards*, vol. XVIII, p. 32, para. 39.

[519] Available online at http://treaties.un.org/ (status of treaties), *Multilateral Treaties ...* , footnote 341

concern articles other than articles 1 to 3, as provided for in article 12, paragraph 1, of the Convention, is moreover revealing as regards the interpretation to be followed.

(8) The term "reservations expressly authorized" by the treaty must be interpreted restrictively in order to meet the objective of article 20, paragraph 1. In the case between France and the United Kingdom concerning *Delimitation of the Continental Shelf*, the Court of Arbitration rightly considered that:

> "Only if the Article had authorized the making of specific reservations could parties to the Convention be understood as having accepted a particular reservation in advance."[520]

In order to determine which "expressly authorized" reservations do not require subsequent unilateral acceptance, it is thus appropriate to determine which reservations the parties have already consented to in the treaty. In this connection, it has been noted that that "where the contents of authorized reservations are fixed beforehand, acceptance can reasonably be construed as having been given in advance, at the moment of consenting to the treaty".[521]

(9) In line with this opinion, article 20, paragraph 1, covers two types of prior authorizations by which parties do not simply accept the abstract possibility of formulating reservations but determine in advance exactly what reservations may be made. On the one hand, a reservation made pursuant to a reservations clause that authorizes the parties simply to exclude the application of a provision[522] or an entire part of the treaty[523] must be deemed to be an "expressly authorized reservation". In this case, the other contracting States and contracting organizations can see exactly, at the time the treaty is concluded, what contractual relations they will have with the parties that exercise the option of making reservations pursuant to the exclusion clause. On the other hand, "negotiated"[524] reservations can also be regarded as specified reservations. Indeed, certain international conventions do not merely authorize States parties to make reservations to one provision or another but contain an exhaustive list of reservations from among which States must make their choice.[525] This procedure also allows contracting States and contracting organizations

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above, ch. XXI.4.

[520] Decision of 30 June 1977, footnote 518 above, p. 32, para. 39.

[521] F. Horn, footnote 321 above, p. 133.

[522] See, for example, article 20, paragraph 1, of the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws: "Any High Contracting Party may, when signing or ratifying the present Convention or acceding thereto, append an express reservation excluding any one or more of the provisions of Articles 1 to 17 and 21." Treaties often authorize a reservation excluding the application of a provision concerning the settlement of disputes (see Pierre-Henri Imbert, *Les réserves aux traités multilatéraux*, (Pedone: Paris, 1979), p. 169 (note 27) and R. Riquelme Cortado, footnote 343 above, pp. 135–136).

[523] Revised General Act for the Pacific Settlement of International Disputes of 1949, article 38; European Convention for the Peaceful Settlement of Disputes of 1957, article 34. The Convention concerning Minimum Standards of Social Security, No. 102, of the International Labour Organization (ILO) combines, moreover, this possibility of rejecting the application of entire chapters with a minimum number of chapters that must actually be applied (art. 2) (see also article 2 of ILO Convention No. 128 concerning Invalidity, Old-Age and Survivors' Benefits, article 20 of the European Social Charter or article 2 of the European Code of Social Security of 1964). See also R. Riquelme Cortado, footnote 343 above, p. 134.

[524] Regarding this notion, see also *Yearbook ... 2000*, vol. II, Part Two, p. 116, para. (11) of the commentary on guideline 1.1.8. See also W. Paul Gormley, "The Modification of Multilateral Conventions by Means of 'Negotiated Reservations' and Other 'Alternatives': A Comparative Study of the ILO and Council of Europe", Part I, *Fordham Law Review*, vol. 39 (1970–1971), pp. 75–76 and P.-H. Imbert, footnote 522 above, pp. 196–199.

[525] For Council of Europe practice, see R. Riquelme Cortado, footnote 343 above, pp. 130–131.

to gauge precisely and *a priori* the impact and effect of a reservation on treaty relations. By expressing its consent to be bound by the treaty, a State or an international organization consents to any reservations permitted by the "list".

(10) In these two cases, the content of the reservation is sufficiently predetermined by the treaty for these reservations to be able to be considered "expressly authorized" within the meaning of article 20, paragraph 1, of the Vienna Conventions. The contracting States and contracting organizations are aware in advance of the treaty relations that derive from the formulation of a given reservation and have agreed to it in the actual text of the treaty. There is no surprise, and the principle of consent is not undermined.

(11) The Commission has, moreover, provided a starting point for a definition of the notion of expressly authorized reservations in its guideline 3.1.4 (Permissibility of specified reservations). Pursuant to this provision:

> "Where the treaty envisages the formulation of[526] specified reservations without defining their content, a reservation may be formulated by a State or an international organization only if it is not incompatible with the object and purpose of the treaty."

A contrario, a specified reservation whose content is fixed in the treaty is considered *ipso facto* permissible and, given the provision expressly authorizing them, established.

(12) The first paragraph of guideline 4.1.1 reproduces the text of article 20, paragraph 1, of the 1986 Vienna Convention. While this repetition may not be strictly necessary, and the principle laid out follows from a close reading of guideline 4.1 and the second paragraph of guideline 4.1.1, it is in line with the Commission's established and consistent practice of incorporating the provisions of the Convention in the Guide to Practice, to the extent possible. This is also why the Commission has not changed the wording despite the fact that the phrase "unless the treaty so provides" states the obvious and, moreover, appears superfluous in this provision.[527]

(13) The second paragraph of guideline 4.1.1 sets forth the specific rule that applies to the establishment of reservations expressly authorized by the treaty as an exception to the general rule established in guideline 4.1, laying down the single condition to be met for an expressly authorized reservation to be established: it must be formulated in accordance with the required form and procedures.[528]

(14) In both paragraphs, as indeed in all the provisions that use the term,[529] "contracting States and contracting organizations" covers three possible scenarios: one in which only States are concerned; more exceptionally, one in which international organizations alone are contracting parties; and the intermediate hypothesis, in which contracting States and contracting organizations coexist.

(15) It should also be emphasized that, once it has been clearly established that a particular reservation falls under article 20, paragraph 1, not only is its acceptance by the other parties unnecessary, but the parties are deemed to have effectively and definitively accepted it, with all the consequences that follow therefrom. One of the consequences of

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[526] The French text of guideline 3.1.4 uses, probably by mistake, the definite article "*des*"; it should instead read: "*Lorsque le traité envisage la formulation de réserves déterminées sans en préciser le contenu, une réserve ne peut être formulée par un État ou une organisation internationale que si elle n'est pas incompatible avec l'objet et le but du traité.*"

[527] See D. Müller, footnote 396 above, p. 888, para. 7.

[528] For the exact meaning of the required "procedures", see note 504 above.

[529] See note 468 above.

this particular regime is that the other parties cannot object to this type of reservation.[530] Accepting this reservation in advance in the text of the treaty itself effectively prevents the contracting States and contracting organizations from subsequently making an objection, as "[t]he Parties have already agreed that the reservation is permissible and, having made its permissibility the object of an express agreement, the Parties have abandoned any right thereafter to object to such a reservation".[531] An amendment[532] proposed by France at the Vienna Conference expressed exactly the same idea, but was not adopted by the Drafting Committee.[533] Guideline 2.8.12 (Final nature of acceptance of a reservation) is therefore applicable *a fortiori* to expressly authorized reservations. They are deemed to have been accepted, and thus there can be no objection to them.

4.1.2 Establishment of a reservation to a treaty which has to be applied in its entirety

A reservation to a treaty in respect of which it appears, from the limited number of negotiating States and organizations and the object and purpose of the treaty, that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty is established with regard to the other contracting States and contracting organizations if it is permissible and was formulated in accordance with the required form and procedures, and if all the other contracting States and contracting organizations have accepted it.

Commentary

(1) A specific case provided for by article 20, paragraph 2, of the Vienna Conventions is that of treaties which must be applied in their entirety. Paragraph 2 states that the flexible system shall not apply to any treaty whose application in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty. In such cases, a reservation requires acceptance by all the parties.

(2) Fitzmaurice made a distinction between plurilateral treaties, which were in his view closer to bilateral treaties, and multilateral treaties;[534] however, it was only in Sir Humphrey Waldock's first report that the usefulness of such a distinction became clearly apparent. What is now article 20, paragraph 2, resulted from a compromise between the members of the Commission who remained deeply convinced of the virtues of the traditional system of unanimity and the proponents of Sir Humphrey's flexible system.[535] At the time, the paragraph represented the last bastion which the proponents of unanimity refused to give up. During the second reading of the Waldock draft, the principle behind article 20, paragraph 2, no longer gave rise to debate in the Commission or at the Vienna Conference.

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[530] D.W. Bowett, footnote 363 above, p. 84; M. Coccia, footnote 315 above, p. 9.

[531] D.W. Bowett, *ibid.*, pp. 84–85.

[532] A/CONF.39/C.1/L.169. Paragraph 2 of the single article that, according to the French proposal, was to replace articles 16 and 17 of the International Law Commission draft provided that "a reservation expressly authorized by the treaty cannot be the subject of an objection by other contracting States, unless the treaty so provides" (*United Nations Conference on the Law of Treaties, Documents of the Conference* (A/CONF.39/11/Add.2), footnote 313 above, p. 133).

[533] With regard to the rejection of that amendment, Pierre-Henri Imbert concluded that the States represented at the Conference did not want to restrict the right to object to expressly authorized reservations (*op. cit.*, footnote 522 above, p. 55).

[534] First report on the law of treaties, A/CN.4/101, *Yearbook ... 1956*, vol. II, p. 127, para. 97.

[535] The Special Rapporteur stressed that "paragraph [4] and paragraph 2 represented the balance on which the whole article was based" (*Yearbook ... 1962*, vol. I, 664th meeting, 19 June 1962, p. 230, para. 17). See also the statements made by Gros (*ibid.*, 663rd meeting, 18 June 1962, pp. 228 and 229, para. 97) and Ago (*ibid.*, p. 228, para. 87).

(3) However, the main issue is not the principle of unanimity, which has long been practised. Rather, the question is how to determine which treaties are not subject to the safeguard clause and are therefore excluded from the flexible system. Until 1965, the limited number of parties was the only criterion referred to by the special rapporteurs and the Commission.[536] Sir Humphrey's fourth report took into account the criticisms levelled against that criterion and recognized that "to find a completely precise definition of the category of treaties in issue is not within the bounds of possibility".[537] At the same time, he proposed a reference to the intention of the parties: "the application of its provisions between all the parties is to be considered an essential condition of the treaty".[538] The parties' intention to preserve the integrity of the treaty was therefore the criterion for ruling out the "flexible" system and retaining the traditional unanimity system. The Commission adopted that idea, making minor drafting changes to what would become the present paragraph 2.[539]

(4) It is worth noting, however, that the new provision addresses a completely different category of treaty than had been envisaged before 1962. The reference to intention has two advantages. First, it allows the flexible system to extend to treaties which, although ratified by only a small number of States, are otherwise more akin to general multilateral treaties. Second, it excludes treaties that have been ratified by a more significant number of States, but whose very nature requires that the integrity of the treaty be preserved. The concept of the plurilateral treaty has therefore shifted towards that of a treaty whose integrity must be ensured.[540]

(5) The criterion of number was never completely discarded, and is still contained in article 20, paragraph 2. However, its function has changed: whereas prior to 1965 it was the sole factor in determining whether or not a given treaty was subject to the "flexible" system, its purpose is now to shed light on the intention of the parties. As a result, it now carries less weight in determining the nature of a treaty, having become an auxiliary criterion in this respect while unfortunately remaining somewhat imprecise and difficult to apply.[541] The reference to the "limited number of the negotiating States and negotiating organizations or, as the case may be, of the negotiating organizations" is particularly unusual, and does not allow a clear distinction to be made between such treaties and multilateral treaties proper; the latter can also be concluded as a result of negotiations between only a few States and international organizations. It would seem preferable to refer not to negotiating States and negotiating international organizations, but rather to States authorized to become parties to the treaty.[542]

(6) Sir Humphrey proposed other "auxiliary" criteria that could assist in the intrinsically problematic task of establishing the parties' intentions. In his fourth report, he also

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[536] This is true of G.G. Fitzmaurice (draft article 38 in the first report on the law of treaties, A/CN.4/101, *Yearbook ... 1956*, vol. II, p. 115) and of Waldock (draft article 1 (d), first report on the law of treaties, A/CN.4/144, *Yearbook ... 1962*, vol. II, p. 221). Draft article 20, para. 3, which was adopted by the Commission on first reading in 1962, refers to treaties concluded "between a small group of States" (*Yearbook ... 1962*, vol. II, p. 176).

[537] Document A/CN.4/177 and Add.1 and 2, *Yearbook ... 1965*, vol. II, p. 51, para. 7.

[538] Draft article 19, para. 2, *ibid.*, p. 50.

[539] See *Yearbook ... 1965*, vol. I, 813th meeting, 29 June 1965, pp. 258–260, paras. 36–53, and *ibid.*, 816th meeting, 2 July 1965, pp. 283 and 284, paras. 43–49.

[540] P.-H. Imbert, footnote 522 above, p. 115.

[541] See in particular the criticisms made by Pierre-Henri Imbert, *ibid.*, pp. 112–113. See also the United States proposal at the Vienna Conference, to delete any reference to criteria other than intention, owing to those difficulties, *United Nations Conference on the Law of Treaties, First session, Summary records* (A/CONF.39/11), footnote 313 above, 21st meeting, 10 April 1968, p. 108, para. 9.

[542] P.-H. Imbert, footnote 522 above, pp. 112–113.

mentioned the nature of the treaty and the circumstances of its conclusion.[543] The change was never explained, and despite the proposals of the United States, which pressed for the definition to refer to the nature of the treaty,[544] the object and purpose of the treaty was the only other "auxiliary" criterion adopted by the Commission and subsequently at the Vienna Conference. The criterion of the object and purpose of the treaty,[545] like the criterion of number, is far from clear-cut, and it has even been held that, rather than clarify the interpretation of paragraph 2, it renders it even more vague and subjective.[546]

(7) Furthermore, paragraph 2 of article 20 is unclear, or at any rate difficult to interpret, not only in respect of its scope, but also in respect of the applicable legal regime. Under paragraph 2, reservations require acceptance by all parties. Only two things can be deduced for certain. First, such reservations are not subject to the "flexible" system set forth in paragraph 4; indeed, paragraph 4 confirms that view, in that it applies only to "cases not falling under the preceding paragraphs". Secondly, the reservations are indeed subject to unanimous acceptance: they must be accepted "by all the parties".

(8) However, paragraph 2 of article 20 does not clearly state who should actually accept the reservation. The text does refer to "the parties", but this is hardly satisfactory. It is questionable whether the acceptance of a reservation by all "parties" only should be a condition, a "party" being defined under article 2, paragraph 1 (g), as "a State or an international organization which has consented to be bound by the treaty and for which the treaty is in force". That would contradict the underlying idea, which is that the treaty should be implemented in its entirety by all current and future parties. To argue otherwise would, in no small measure, deprive unanimous consent of its meaning.

(9) Moreover, although article 20, paragraph 5, connects the principle of tacit or implied consent to paragraph 2, it remains a mystery how implied acceptance could apply to the treaties referred to in the latter provision. It follows from article 20, paragraph 5, that a contracting State or contracting organization may make an objection only on becoming a party to the Treaty. A signatory State or signatory organization could thus block unanimous acceptance even without formulating a formal objection to the reservation, because it would be impossible to presume that State's assent before the 12-month deadline elapsed. Article 20, paragraph 5, would therefore have the exact opposite of the desired effect, namely the rapid stabilization of treaty relations and of the status of the reserving State vis-à-vis the treaty.[547] For precisely that reason, the Special Rapporteur argued in 1962 that where States not yet parties to a treaty are concerned,

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[543] A/CN.4/177 and Add.1 and 2, *Yearbook ... 1965*, vol. II, p. 51, para. 7.

[544] See amendment A/CONF.39/C.1/L.127, *United Nations Conference on the Law of Treaties, Documents of the Conference* (A/CONF.39/11/Add.2), footnote 313 above, p. 135.

[545] See guidelines 3.1.5 (Incompatibility of a reservation with the object and purpose of the treaty) and 3.1.6 (Determination of the object and purpose of the treaty), *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), pp. 66–82. In its advisory opinion of 24 September 1982, the Inter-American Commission on Human Rights found that "Paragraph 2 of Article 20 is inapplicable, inter alia, because the object and purpose of the Convention is not the exchange of reciprocal rights between a limited number of States, but the protection of the human rights of all individual human beings within the Americas, irrespective of their nationality" (see footnote 500 above, para. 27).

[546] See C. Tomuschat, footnote 321 above, p. 479; P.-H. Imbert, footnote 522 above, pp. 114–115.

[547] See D. Müller, footnote 396 above, pp. 820–821, paras. 46–47.

> "[t]his qualification of the rule is not possible in the case of plurilateral treaties because there the delay of taking a decision does place in suspense the status of the reserving State vis-à-vis all the States participating in the treaty."[548]

(10) Such lacunae and inconsistencies are particularly surprising given that article 18 as proposed by Sir Humphrey in 1962 made a clear distinction between the tacit or implied acceptance of "plurilateral treaties" on the one hand and of multilateral treaties on the other hand.[549] While these clarifications specified the legal regime for the treaties referred to in article 20, paragraph 2, perfectly well, they were nevertheless sacrificed in order to make the provisions on reservations less complex and more succinct.

(11) In an attempt to remove such uncertainties, guideline 4.1.2 clearly specifies that, where this type of treaty is concerned, a reservation is established only "if all the contracting States and contracting organizations have accepted it", by which is meant all the States and international organizations that have already ratified the treaty or do so within the 12-month period following the formulation of the reservation.

(12) The relatively complex wording that the Commission adopted for guideline 4.1.2 is the result of its desire to follow the wording of article 20, paragraph 2, as closely as possible, while also giving a complete list of the conditions that must be met for reservations to the treaties in question to be established, following the pattern of guideline 4.1.

(13) The two criteria adopted for establishing that a treaty is of the type that "has to be applied in its entirety" (a limited number of negotiating States and organizations, and the object and purpose of the treaty) are indicative but not necessarily cumulative or exhaustive.

4.1.3 Establishment of a reservation to a constituent instrument of an international organization

A reservation to a treaty which is a constituent instrument of an international organization is established with regard to the other contracting States and contracting organizations if it is permissible and was formulated in accordance with the required form and procedures, and if it has been accepted in conformity with guidelines 2.8.7 to 2.8.10.

Commentary

(1) The third — and final — exception to the "flexible" regime set out in article 20, paragraph 4, of the Vienna Conventions is provided for by paragraph 3 of that article and relates to constituent instruments of international organizations. Under the terms of the provision:

> When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

(2) A simple perusal of this provision shows that, in order to be established, a reservation to the constituent instrument of an international organization calls for the acceptance of the competent organ of the organization. The modalities for formulating such acceptance are the subject of guidelines 2.8.7 to 2.8.11,[550] the commentaries to which explain the meaning and describe the *travaux préparatoires* for this provision.[551]

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[548] *Yearbook ... 1962*, vol. II, p. 67, para. (16).

[549] First report, A/CN.4/144, *Yearbook ... 1962*, vol. II, pp. 61–62.

[550] *2.8.7 Acceptance of a reservation to the constituent instrument of an international organization –*

(3) It does not appear necessary to recall once again the reasons that led the Commission and the Conference to adopt the provisions contained in article 20, paragraph 3, of the Vienna Conventions. Although guideline 2.8.7 is sufficient to express the need for the acceptance of the competent organ of the organization, the Commission considered that it was worth recalling this particular requirement in the section dealing with the effects of reservations, given that the acceptance of the competent organ is the *sine qua non* for the establishment of a reservation to the constituent instrument of an international organization. Only this collective acceptance can enable the reservation to produce all its effects. The individual acceptance of the other members of the organization, while clearly not prohibited, has no effect on the establishment of the reservation.[552]

4.2 Effects of an established reservation

Commentary

(1) A reservation "established" within the meaning of guideline 4.1 produces all the effects purported by its author, that is to say, to echo the wording of guideline 1.1.1 (Object of reservations), it excludes or modifies "the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects".[553] At that point, the object of the reservation as desired or purported by its author is achieved.

(2) However, modifying or excluding the legal effect of one or more provisions of the treaty is not the only result of the establishment of the reservation; it also constitutes the author of the reservation a contracting party to the treaty. Following the establishment of the reservation, the treaty relationship is established between the author of the reservation

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When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

2.8.8 Organ competent to accept a reservation to a constituent instrument – Subject to the rules of the organization, competence to accept the reservation to a constituent instrument of an international organization belongs to the organ competent to decide on the admission of a member to the organization, or to the organ competent to amend the constituent instrument, or to the organ competent to interpret this instrument.

2.8.9 Modalities of the acceptance of a reservation to a constituent instrument – Subject to the rules of the organization, the acceptance by the competent organ of the organization shall not be tacit. However, the admission of the State or the international organization which is the author of the reservation is tantamount to the acceptance of that reservation.

For the purposes of the acceptance of a reservation to the constituent instrument of an international organization, the individual acceptance of the reservation by States or international organizations that are members of the organization is not required.

2.8.10 Acceptance of a reservation to a constituent instrument that has not yet entered into force – In the case set forth in guideline 2.8.7 and where the constituent instrument has not yet entered into force, a reservation is considered to have been accepted if no signatory State or signatory international organization has raised an objection to that organization by the end of a period of 12 months after they were notified of that reservation. Such a unanimous acceptance thus obtained is final.

[551] See the commentaries to guidelines 2.8.7 to 2.8.10, *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), pp. 243–254; on the *travaux préparatoires*, see in particular pp. 243–245, paras. (2) to (5).

[552] See guideline 2.8.11: *Reaction by a member of an international organization to a reservation to its constituent instrument* – Guideline 2.8.7 does not preclude States or international organizations that are members of an international organization from taking a position on the permissibility or appropriateness of a reservation to a constituent instrument of the organization. Such an opinion is in itself devoid of legal effects.

[553] *Yearbook ... 1999*, vol. II, Part Two, p. 93.

and the contracting party or parties with regard to which the reservation is established, and this has consequences in terms of the status of the contracting State or contracting organization (guideline 4.2.1), the entry into force of a treaty (guideline 4.2.2), the existence of a treaty relationship between the author of the reservation and the parties with regard to which the reservation is established (guideline 4.2.3) and the resultant treaty relations (guidelines 4.2.4 and 4.2.5).

4.2.1 Status of the author of an established reservation

As soon as a reservation is established in accordance with guidelines 4.1 to 4.1.3, its author becomes a contracting State or contracting organization to the treaty.

Commentary

(1) The establishment of the reservation has a number of consequences for its author relating to the very existence of the treaty relationship and the author's status in relation to the other contracting parties. It may even result in the entry into force of the treaty for all of the contracting States or contracting international organizations. These consequences follow directly from subparagraphs (a) and (c) of paragraph 4 of article 20, of the Vienna Conventions. The first of these provisions relates to the establishment of treaty relations between the author of the reservation and the contracting party which has accepted it (hence, the contracting party with regard to which the reservation is established); the second relates to whether the consent of the reserving State or reserving international organization takes effect, or in other words whether the author of the reservation becomes a contracting party to the treaty. In the 1986 Convention these provisions read as follows:

> 4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:
>
> (a) Acceptance of a reservation by a contracting State or by a contracting organization constitutes the reserving State or international organization a party to the treaty in relation to the accepting State or organization if or when the treaty is in force for the reserving State and for the accepting State or organization;
>
> (b) ...
>
> (c) An act expressing the consent of a State or of an international organization to be bound by the treaty and containing a reservation is effective as soon as at least one contracting State or one contracting organization has accepted the reservation.

(2) The Commission's commentary to draft article 17 (which became article 20) clearly explains the intent of these provisions:

> Paragraph 4 contains the three basic rules of the "flexible" system which are to govern the position of the contracting States in regard to reservations to any multilateral treaties not covered by the preceding paragraphs. Subparagraph (a) provides that acceptance of a reservation by another contracting State constitutes the reserving State a party to the treaty in relation to that State if or when the treaty is in force. [...].[554] Subparagraph (c) then provides that an act expressing the consent of a

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[554] Subparagraph (b) primarily concerns the effects of an objection to a valid reservation. In this connection see below section 4.3 of the Guide to Practice and, in particular, guidelines 4.3.1 (Effect of an objection on the entry into force of the treaty as between the author of the objection and the author of a reservation) and 4.3.4 (Non-entry into force of the treaty as between the author of a reservation and the author of an objection with maximum effect).

> State to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation. This provision is important since it determines the moment at which a reserving State may be considered as a State which has ratified, accepted or otherwise become bound by the treaty.[555]

(3) Article 20, paragraph 4 (a), of the 1969 Vienna Convention (the gist of which is reproduced in guideline 4.2.3) does not resolve the issue of the date on which the author of the reservation may be considered to have joined the group of contracting States or contracting international organizations. Article 20, paragraph 4 (c), was inserted into the Convention by the Commission in order to fill that gap. As Waldock explained in his fourth report:

> The point is not purely one of drafting, since it touches the question of the conditions under which a reserving State is to be considered a "party" to a multilateral treaty under the "flexible" system. Indeed, not only the Australian but also the Danish Government urges the Commission to deal explicitly with that question, since it may affect the determination of the date on which the treaty comes into force and may otherwise be of concern to a depositary. The Special Rapporteur understands the position under the "flexible" system to be that a reserving State is to be considered as a "party" if and at the moment when another State which has established its consent to be bound by the treaty accepts the reservation either expressly or tacitly under paragraph 3 of the existing article 19 (paragraph 4 of the new article 20 as given below).[556]

(4) Waldock's explanation, which thus gave rise to article 20, paragraph 4 (c), of the 1969 Convention, does call for some modification or, at any event, some clarification: it is often impossible to determine whether the author of the reservation becomes a "party" to the treaty in the sense of article 2, paragraph 1 (g), of the 1969 Convention, as, independently of the establishment of the reservation, the treaty may not be in force owing to the low number of ratifications or acceptances – a situation covered by the draft guideline 4.2.3 below.

(5) However, what can be determined with certainty is whether and when the author becomes a contracting State or contracting organization, in other words, if it has "consented to be bound by the treaty, whether or not the treaty has entered into force" (article 2, paragraph 1 (f)). That is precisely the subject of article 20, paragraph 4 (c), which merely states that the "act expressing [the author of the reservations] consent to be bound by the treaty and containing a reservation *is effective* when at least one other contracting State has accepted the reservation".[557]

(6) Although the general rule seems to be clearly established by article 20, paragraph 4 (c), of the Vienna Conventions — the author of a reservation becomes a contracting State or contracting organization as soon as its valid reservation has been accepted by at least one contracting State or one contracting organization — its practical application is far from consistent and is even less coherent. The main actors concerned by the application of this rule, that is, depositaries, have almost always applied it in a very approximate manner.

(7) The Secretary-General of the United Nations, in his capacity as depositary of multilateral treaties, for example, agrees that any instrument expressing consent to be bound by a treaty which is accompanied by a reservation may be deposited and, refusing to

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[555] *Yearbook ... 1966*, vol. II, p. 207, para. (21), of the commentary.

[556] *Yearbook ... 1965*, vol. II, pp. 52–53, para. 11.

[557] Emphasis added.

adopt a position on the issue of the validity or effects of the reservation, "indicates the date on which, in accordance with the treaty provisions, the instrument would normally produce its effect, leaving it to each party to draw the legal consequences of the reservations that it deems fit".[558] In other words, the Secretary-General does not wait for at least one acceptance to be received before accepting the definitive deposit of an instrument of ratification or accession accompanied by a reservation, but treats such instruments in the same way as any other ratification or accession that is not accompanied by a reservation.

> Since he is not to pass judgment, the Secretary-General is not therefore in a position to ascertain the effects, if any, of the instrument containing reservations thereto and, *inter alia*, to determine whether the treaty enters into force as between the reserving State and any other State, or *a fortiori* between a reserving State and an objecting State if there have been objections. As a consequence, if the final clauses of the treaty in question stipulate that the treaty shall enter into force after the deposit of a certain number of instruments of ratification, approval, acceptance or accession, the Secretary-General as depositary will, subject to the considerations in the following paragraph, include in the number of instruments required for entry into force all those that have been accepted for deposit, whether or not they are accompanied by reservations and whether or not those reservations have met with objections.[559]

(8) This position has been criticized[560] in view of the content of article 20, paragraph 4 (c), of the Vienna Conventions (read in conjunction with article 20, paragraph 5). It has been justified by the Secretary-General by the fact that:

> no objection had ever in fact been received from any State concerning an entry into force that included States making reservations. Finally, for a State's instrument not to be counted, it might conceivably be required that all other contracting States, without exception, would have not only objected to the participation of the reserving State, but that those objecting States would all have definitely expressed their intention that their objection would preclude the entry into force of the treaty as between them and the reserving State.[561]

(9) To give a recent example, Pakistan acceded to the International Convention for the Suppression of the Financing of Terrorism through a notification dated 17 June 2009. That instrument was accompanied by reservations to articles 11, 14 and 24 of the Convention.[562] Despite these reservations, the Secretary-General noted in his depositary notification of 19 June 2009 that:

> The Convention will enter into force for Pakistan on 17 July 2009 in accordance with its article 26 (2) which reads as follows:
>
> > "For each State ratifying, accepting, approving or acceding to the Convention after the deposit of the twenty-second instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth

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[558] United Nations, *Summary of practice of the Secretary-General as depositary of multilateral treaties* (New York, 1999) ST/LEG/7/Rev.1, para. 187.

[559] *Ibid.*, para. 184.

[560] See Pierre-Henri Imbert, "A l'occasion de l'entrée en vigueur de la Convention de Vienne sur le droit des traités, réflexions sur la pratique suivie par le Secrétaire général des Nations Unies dans l'exercice de ses fonctions de dépositaire" in *Annuaire français de droit international*, 1980, pp. 524–541; G. Gaja, footnote 364 above, pp. 323–324; R. Riquelme Cortado, footnote 343 above, pp. 245–250; or D. Müller, "Article 20 (1969)", footnote 324 above, pp. 821 and 822, para. 48.

[561] United Nations, *Summary of practice of the Secretary-General as depositary of multilateral treaties*, (New York, 1999) ST/LEG/7/Rev.1, para. 186.

[562] *Multilateral Treaties* ... , footnote 341 above, chap. XVIII.11.

> day after deposit by such State of its instrument of ratification, acceptance, approval or accession."[563]

Pakistan's instrument is therefore considered by the depositary as taking immediate effect, notwithstanding article 20, paragraph 4 (c), of the 1969 Vienna Convention. For the depositary, Pakistan is one of the contracting States, indeed one of the parties, to the International Convention for the Suppression of the Financing of Terrorism, independently of whether its reservations have been accepted by at least one other contracting party.[564]

(10) This practice, which seems to have been followed for many years and which existed well before the adoption of the 1969 Vienna Convention, has also been followed by other depositary institutions or States. Thus, both the Dominican Republic and the Council of Europe informed the Secretary-General of the United Nations in 1965, as depositaries,[565] that a reserving State was "immediately counted among the number of countries necessary for bringing the convention into force"[566] – in other words as soon as it has expressed its consent to be bound, accompanying it with a reservation. Other depositaries, including the United States of America, the Organization of American States and the Food and Agriculture Organization of the United Nations, reported a more nuanced practice and do not in principle count reserving States as contracting States.[567]

(11) Without intending to express a view on the correctness of this practice,[568] the Commission is of the view that, although application of article 20, paragraph 4 (c), of the Vienna Conventions is hesitant, to say the least, the rule expressed in this provision has not lost its authority. It is certainly part of the reservations regime established by the 1969 and 1986 Vienna Conventions which the Commission decided, as a matter of principle, to complement rather than contradict it.[569] According to the terms of article 20, paragraph 4 (c), of the Vienna Conventions, the author of a reservation does not become a contracting State or organization until at least one other contracting State or other contracting organization accepts the reservation, either expressly — which seldom occurs — or tacitly on expiration of the time period set by article 20, paragraph 5, and referred to in guidelines 2.6.13[570] and 2.8.1.[571] In the worst case, the consequence of strict application of this provision is a delay of 12 months in the entry into force of the treaty for the author of the reservation. This delay may certainly be considered undesirable; nevertheless, it is caused by the author of the reservation, and it can be reduced by express acceptance of the reservation on the part of a single other contracting State or a single other contracting international organization.

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[563] Depositary notification No. C.N.371.2009.TREATIES-1, available from http://treaties.un.org *Depositary Notifications*.

[564] See also, for example, the reservation of El Salvador accompanying its ratification on 27 May 2008 of the Stockholm Convention on Persistent Organic Pollutants. The depositary notification of the Secretary-General of 25 August 2008 states that El Salvador will be considered to be a State party on "the ninetieth day after the date of deposit of such State or regional economic integration organization of its instrument of ratification, acceptance, approval or accession", in accordance with article 26 of the Convention (C.N.436.2008.TREATIES-5, *ibid.*), or the declaration of the Islamic Republic of Iran accompanying its act of accession to the Convention on the Rights of Persons with Disabilities and the depositary notification relating thereto (C.N.792.2009.TREATIES-37, *ibid.*).

[565] *Yearbook ... 1965*, vol. II, p. 98.

[566] *Ibid.*

[567] *Ibid.*

[568] See below, guideline 4.2.2 and commentary thereto.

[569] *Yearbook ... 1995*, vol. II, Part Two, pp. 107–108, para. 481.

[570] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), pp. 213–217.

[571] *Ibid., Sixty-fourth Session, Supplement No. 10* (A/64/10), pp. 225–229.

(12) This is the case generally. However, the wording of guideline 4.2.1 covers both the general case and the specific situations covered by article 20, paragraphs 1, 2 and 3 of the Vienna Conventions. That is why guideline 4.2.1 does not purely and simply echo the condition of one acceptance, but speaks of the establishment of a reservation.[572] That formulation makes it possible to cover, for example, in the same guideline reservations whose establishment does not require acceptance by another party because express provision is made for them in the treaty.[573] A reservation thus established will constitute the author of the reservation a contracting State or contracting organization.

(13) This was the reasoning followed, for example, by the Inter-American Court of Human Rights in its opinion of 1981, where it concluded that a reserving State became one of the contracting States or contracting parties as from the date of ratification. Admittedly the reasoning rests on a fairly broad interpretation of the notion of "reservation expressly authorized" (art. 20, para. 1).[574] The conclusion reached regarding the effects of a reservation thus established is, however, uncontroversial:

> Accordingly, for the purpose of the present analysis, the reference in Article 75 to the Vienna Convention makes sense only if it is understood as an express authorization designed to enable States to make whatever reservations they deem appropriate, provided the reservations are not incompatible with the object and purpose of the treaty. As such, they can be said to be governed by Article 20 (1) of the Vienna Convention and, consequently, do not require acceptance by any other State Party.[575]

(14) In the light of these considerations, the Commission has decided to include in the Guide to Practice guideline 4.2.1, which expresses the idea of article 20, paragraph 4 (c), rather than reproducing it word for word. As soon as a reservation is established within the meaning of guidelines 4.1, 4.1.1, 4.1.2 and 4.1.3, the instrument of ratification or accession of the author of the reservation takes effect and constitutes the author a contracting State or a contracting organization. This has the result that the author of the reservation becomes a contracting State or contracting organization, with the ensuing consequences if the treaty is not yet in force,[576] or a party to the treaty if it has already entered into force or comes into force for this reason.[577]

4.2.2 Effect of the establishment of a reservation on the entry into force of a treaty

1. When a treaty has not yet entered into force, the author of a reservation shall be included in the number of contracting States and contracting organizations required for the treaty to enter into force once the reservation is established.

2. The author of the reservation may, however, be included at an earlier date in the number of contracting States and contracting organizations required for the treaty to enter into force, if no contracting State or contracting organization is opposed in a particular case.

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[572] See also the commentary to guideline 4.2.3, paras. (2) and (3), below.

[573] See guideline 4.1.1 and the commentary thereto.

[574] Inter-American Court of Human Rights, Advisory Opinion OC-228, 24 September 1982, *The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights*, para. 36.

[575] *Ibid.*, para. 35.

[576] See guideline 4.2.2 below.

[577] See guideline 4.2.3 below.

Commentary

(1) When applying the general rule set forth in guideline 4.2.1, a distinction must be drawn according to whether the treaty is not in force – a situation which may give rise to some fairly complex issues, which are dealt with in guideline 4.2.2 — or is in force — a much easier situation, which is addressed in guideline 4.2.3.

(2) Indeed, if the treaty has not yet entered into force, the establishment of the reservation and the validity of the instrument through which the author of the reservation has expressed consent to be bound by the treaty may have the consequence that the treaty enters into force for all contracting States and organizations, including the author of the reservation. That is the case if, following the establishment of the reservation, the addition of the author to the number of contracting parties has the result that the conditions for the entry into force of the treaty are fulfilled. This result depends heavily on the circumstances of the case, and in particular on the conditions for the entry into force of the treaty as established by its final clauses, the number of contracting parties and so on. It is thus scarcely possible to derive a general rule in this respect except that the author of the established reservation should be included in the number of contracting States or organizations that determines the entry into force of the treaty. This is the principle established by guideline 4.2.2, paragraph 1.

(3) The purpose of paragraph 2, on the other hand, is to cover — without passing judgment on its merits — what is probably the predominant practice of depositaries (and is, in any case, the practice of the Secretary-General of the United Nations, described above),[578] which is to consider the author of the reservation to be a contracting State or contracting organization as soon as the instrument expressing its consent to be bound has been deposited and, moreover, without giving consideration to the validity or the invalidity of the reservation.

(4) The wording of this second paragraph is prompted by a desire to take into consideration a practice which, up until now, does not seem to have caused any particular difficulties, while not calling into question the very clear rule, scarcely open to varying interpretations, which is laid down in article 20, paragraph 4 (c), of the Vienna Conventions. A mere reference to the possibility of parties reaching an agreement contrary to this rule would not have made it possible to reconcile these two concerns: quite apart from the fact that all the guidelines in the Guide to Practice are only indicative and parties remain free to depart from them by (valid) agreement *inter se*, it is extremely doubtful whether an agreement could be said to have come about merely because the other parties all remain silent. Similarly the International Court of Justice, in its advisory opinion of 1951, refused to consider that the mere fact of using an institutional depositary meant that States agreed to all the depositary's rules and practices:

> It must be pointed out, first of all, that the existence of an administrative practice does not in itself constitute a decisive factor in ascertaining what views the contracting States to the Genocide Convention may have had concerning the rights and duties resulting therefrom.[579]

The Commission likewise did not consider it wise to refer to the depositary's habitual practice without further clarification,[580] for a majority of its members held that that might entrench and encourage the use of such practices, which contradicted the letter and spirit of article 20, paragraph 4 (c), of the Vienna Conventions.

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[578] Paras. (6) to (10) of the commentary to guideline 4.2.1.

[579] Advisory opinion of 28 May 1951, footnote 305 above, *I.C.J. Reports 1951*, p. 25.

[580] Moreover it provided this clarification; see guideline 2.3.2 (Acceptance of late formulation of a reservation). "Unless the treaty provides otherwise *or the well-established practice followed by the depositary differs*, late formulation of a reservation shall be deemed to have been accepted by a

(5) The formula chosen, which is reflected in the addition of a second paragraph, merely describes the practice of certain depositaries as an alternative to the rule. The expression "may, however, be included" reflects the optional nature of this divergent practice, whereas the final qualification "if no contracting State or contracting organization is opposed in a particular case" safeguards the application of the principle established in paragraph 1 should any one contracting State or contracting organization be opposed to that inclusion.

(6) The phrase "at an earlier date" seeks to preserve broad flexibility for practice in the future and, for example, the possibility of not eliminating any time lag whatsoever between the expression of the consent of the author of the reservation to be bound by the treaty and the acquisition of the status of contracting State or contracting organization. But if that were to happen, the practice would remain subject to the principle of there not being any objection.

4.2.3 Effect of the establishment of a reservation on the status of the author as a party to the treaty

The establishment of a reservation constitutes its author a party to the treaty in relation to contracting States and contracting organizations in respect of which the reservation is established if and when the treaty is in force.

Commentary

(1) The rule that the acceptance of a valid reservation establishes a treaty relationship between the author of the reservation and the State or international organization that has accepted it makes good sense. It appears in various forms in the drafts of all the special rapporteurs on the law of treaties. The only difference between Waldock's approach and that of his predecessors lies in the number of acceptances needed in order to produce this effect. The first three special rapporteurs, staunch advocates of the traditional regime of unanimity, did not consider a treaty relationship established until all the other contracting parties had accepted the reservation. In Waldock's flexible approach, each State (or international organization) not only decides for itself whether a reservation is opposable to it or not; that individual acceptance also produces its effects independently of the reactions of the other States or international organizations, although, logically, only in the bilateral relations between the author of the reservation and the author of the acceptance. The Commission explained in its commentary to draft article 20 as adopted on first reading that the application of this flexible system could:

> certainly have the result that a reserving State may be a party to the treaty with regard to State X, but not with regard to State Y, although States X and Y are mutually bound by the treaty. But in the case of a general multilateral treaty or of a treaty concluded between a considerable number of States, this result appears to the Commission not to be as unsatisfactory as allowing State Y, by its objection, to prevent the treaty from coming into force between the reserving State and State X, which has accepted the reservation.[581]

Contracting Party if it has made no objections to such formulation after the expiry of the 12-month period following the date on which notification was received." (See *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 490–493.)

[581] *Yearbook ... 1962*, vol. II, p. 181, para. (23) of the commentary. See also *Yearbook ... 1966*, vol. II, pp. 207–208, para. (22) of the commentary to draft article 17.

(2) This system of "relative" participation in the treaty[582] is applicable, however, only in the "normal" instance of establishment of the reservation. Clearly, it cannot be applied in cases where unanimous acceptance is required in order to establish a reservation. For such a reservation to be able to produce its effects, including the entry into force of the treaty for the author of the reservation, all of the contracting parties must have consented to the reservation.[583] Consequently, the treaty necessarily enters into force in the same way for all of the contracting parties, on the one hand, and the author of the reservation, on the other hand. A comparable solution is necessary in the case of a reservation to the constituent instrument of an international organization; only the acceptance of the competent organ can establish the reservation and constitute its author one of the circle of contracting parties.[584] Once this acceptance is obtained, the author of the reservation establishes treaty relations with all the other contracting parties without their individual consent being required.

(3) In the light of these comments it should, however, be noted that once the reservation is established, in conformity with the rules set out in guidelines 4.1 to 4.1.3, depending on the nature of the reservation and of the treaty, a treaty relationship is formed between the author of the reservation and the contracting party or parties in respect of which the reservation is established: the contracting party which accepted the reservation (in the "normal" case), and all the contracting parties (in the other cases). It thus suffices to recall this rule, which constitutes the core of the Vienna regime, without any need to distinguish again between the general rule and the exceptions to it, as the wording of guidelines 4.1, 4.1.1, 4.1.2 and 4.1.3 makes it possible to determine in respect of whom the reservation is established and with whom the treaty relationship is constituted.

(4) Guideline 4.2.3 draws the consequences of this principle — which is enunciated in guideline 4.2.1 — if the treaty is in force (or enters into force pursuant to guideline 4.2.2). In this case, it goes without saying that the author of an established reservation thereby becomes a party to the treaty within the meaning of article 2, paragraph 1 (g), of the 1986 Vienna Convention and not just a contracting State or contracting organization as defined in paragraph 1 (f) of the same article.

4.2.4 Effect of an established reservation on treaty relations

1. A reservation established with regard to another party excludes or modifies for the reserving State or international organization in its relations with that other party the legal effect of the provisions of the treaty to which the reservation relates or of the treaty as a whole with respect to certain specific aspects, to the extent of the reservation.

2. To the extent that an established reservation excludes the legal effect of certain provisions of a treaty, the author of that reservation has neither rights nor obligations under those provisions in its relations with the other parties with regard to which the reservation is established. Those other parties shall likewise have neither rights nor obligations under those provisions in their relations with the author of the reservation.

3. To the extent that an established reservation modifies the legal effect of certain provisions of a treaty, the author of that reservation has rights and obligations under those provisions, as modified by the reservation, in its relations with the other parties with regard to which the reservation is established. Those other parties shall have rights and obligations under those provisions, as modified by the reservation, in their relations with the author of the reservation.

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[582] *Yearbook ... 1966*, vol. II, pp. 207–208, para. (22) of the commentary to draft article 17.

[583] See above guideline 4.1.2.

[584] See above guideline 4.1.3.

Commentary

(1) The three paragraphs of guideline 4.2.4 are structured as follows:

- The first paragraph sets out the principle contained in article 21, paragraph 1 (a), of the Vienna Convention, with the requisite adjustments for the purposes of the Guide to Practice
- The second paragraph explains the consequences of this principle specifically when an established reservation excludes the legal effect of certain provisions of a treaty, and
- The third does the same when the reservation modifies this legal effect.

(2) In all three cases (and in the title of the guideline) the Commission has used the singular to describe all the consequences attendant upon the establishment of a reservation, although in reality they are diverse, out of a concern to align the wording of the guideline with that of article 2, paragraph 1 (d), of the Vienna Conventions (as reproduced in guideline 1.1), which employs the singular.[585] That provision also establishes the distinction between reservations which purport to "exclude" and those which purport to "modify the legal effect of certain provisions of the treaty in their application" to the author of the reservation, whereas article 21, paragraph 1, states that an established reservation "modifies ... the provisions of the treaty to which the reservation relates", without contemplating an exclusionary effect. Reservations that modify should not, however, be treated as having precisely the same effect as reservations that exclude.

(3) In order to clarify further the content of the obligations and rights of the author of the reservation and of the State or international organization with regard to which the reservation is established, it is helpful to distinguish between, as Frank Horn terms them, "modifying reservations" and "excluding reservations".[586] The distinction is not always easy to make and it can happen that one and the same reservation has both an excluding and a modifying effect. Thus, a reservation by which its author purports to limit the scope of application of a treaty obligation only to a certain category of persons may be understood equally well as a modifying reservation (it modifies the legal effect of the initial obligation by limiting the circle of persons concerned) and as an excluding reservation (it purports to exclude the application of the treaty obligation for all persons not forming part of the specified category).[587] It can also happen that an excluding reservation indirectly has modifying effects. In order to take account of such uncertainty, paragraphs 2 and 3 both begin with the phrase "to the extent that". The distinction does, however, permit a better insight into the two most common situations. The great majority of reservations may be classified in one or other of these categories, or at least understood by means of this distinction.

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[585] Guideline 1.1 (Definition of reservations) – "Reservation" means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to the State or to that international organization. On the other hand, article 21 of the Vienna Conventions is entitled "Legal effects [in the plural] of reservations and of objections to reservations".

[586] F. Horn, footnote 321 above, pp. 80–87.

[587] See for example the Egyptian reservation to the Vienna Convention on Consular Reservations: "Article 49 concerning exemption from taxation shall apply only to consular officers, their spouses and minor children. This exemption cannot be extended to consular employees and to members of the service staff". (*Multilateral Treaties* ... , footnote 341 above, chap. III.6).

(4) Article 21, paragraph 1 (a), of the Vienna Conventions broadly determines the effect that the established reservation produces on the content of its author's treaty relations. In the 1986 Vienna Convention this provision reads:

> A reservation established with regard to another party in accordance with articles 19, 20 and 23:
>
> (a) Modifies for the reserving State or international organization in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; …

(5) Quite apart from the lack of any reference to excluding reservations, although they are included in the very definition of a reservation, another more serious inconsistency may be signalled between the definition of the term "reservation" in the Vienna Conventions and the effects contemplated in article 21, paragraph 1; whereas according to article 21 a reservation modifies "the provisions of the treaty", the purpose of a reservation according to article 2, paragraph 1 (d), is to modify or exclude "the legal effect of certain provisions of the treaty". This problem did not go unnoticed during the debate in the Commission: while some members stressed that the reservation could not change the provisions of the treaty and that it would be preferable to replace "provisions" by "application",[588] other members paid little attention to the matter,[589] or expressed their satisfaction with the text proposed by the Drafting Committee.[590]

(6) In the literature, the question of whether it is the "provisions of the treaty" or their "legal effects" that are modified has been raised more forcefully. Professor Pierre-Henri Imbert is of the view that:

> *C'est précisément le lien établi par les rédacteurs de la Convention de Vienne entre la réserve et les dispositions d'une convention qui nous semble le plus critiquable. En effet, une réserve ne tend à éliminer une* disposition *mais une* obligation.
>
> [It is precisely the link which the drafters of the Vienna Convention established between reservations and the provisions of a convention that seems to be most open to criticism, in that a reservation is aimed at eliminating not a *provision* but an *obligation*.][591]

However, this view considers the effect of the reservation only from the standpoint of its author, and appears to overlook the fact that in modifying the author's obligation the reservation also affects the correlative rights of the States or international organizations in respect of which the reservation is established. It is thus more convincing to conclude that, with regard to this question, article 2, paragraph 1 (d), of the 1969 and 1986 Conventions is better drafted than article 21, paragraph 1. It is unclear how a reservation, which is an instrument external to the treaty, could modify a provision of that treaty. It may exclude or modify its application, that is, its effect, but not the text itself, that is, the provisions.[592]

(7) Moreover the text of article 2, paragraph 1 (d), also does not appear to correspond fully to State practice with respect to reservations, in that it specifies that a reservation can

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[588] Mr. Rosenne (*Yearbook … 1965*, vol. I, 800th meeting, 11 June 1965, p. 172, para. 9, and 814th meeting, 29 June 1965, p. 291, para. 2) and Mr. Tsuruoka (*ibid*., p. 172, para. 16).

[589] Mr. Tunkin "considered it of no great importance whether the wording used was 'modifies the provisions of the treaty' or 'modifies the application of the provisions of the treaty'" (*ibid*., para. 9). For a similar view, see Mr. Briggs (*ibid*., para. 13).

[590] Mr. Briggs (*ibid*., 800th meeting, 11 June 1965, p. 173, para. 28).

[591] P.-H. Imbert, footnote 522 above, p. 15 (emphasis in the original).

[592] See the commentary to guideline 1.1.1 (Object of reservations), *Yearbook … 1999*, vol. II, Part Two, p. 93, para. (2).

purport to exclude or modify only "the legal effect of certain provisions of the treaty".[593] It is in fact not uncommon for States to formulate reservations in order to modify the application of a treaty as a whole, or at least of a substantial part of it. In some cases, such reservations can certainly not be regarded as permissible, in that they deprive the treaty of its object and purpose, so that they cannot be considered "established reservations".[594] However, that is not always the case, and there are in practice many examples of such across-the-board reservations which were not the subject of objections or challenges by the other contracting States.[595] Article 21, paragraph 1, is more open in this respect, in that it simply provides that the reservation modifies [or excludes] "the provisions of the treaty to which the reservation relates to the extent of the reservation". If a reservation can thus permissibly purport to modify the legal effects of all of the provisions of a treaty with respect to certain specific aspects, as the Commission clearly acknowledged in guideline 1.1.1 (Object of reservations),[596] it will have the effect, once established, of modifying the application of all those provisions, or indeed, as the case may be, of all of the provisions of the treaty, in accordance with article 21, paragraph 1.[597]

(8) It follows that a validly established reservation affects the treaty relations of the author of the reservation in that it excludes or modifies the legal effect of one or more provisions of the treaty, or even of the treaty as a whole, with respect to a specific aspect, and on a reciprocal basis.[598]

(9) In accordance with the Commission's well-established practice in the context of the Guide to Practice, paragraph 1 of guideline 4.2.4 largely reproduces article 21, paragraph 1 (a), of the 1986 Vienna Convention while making the modifications justified by the above-mentioned arguments:

- The inclusion of "excluding" reservations
- The point that the reservation does not modify "the provisions of the treaty" but their legal effect

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[593] P.-H. Imbert, footnote 522 above, pp. 14–15; Renata Szafarz, "Reservations to multilateral treaties", *Polish Yearbook of International Law*, vol. 2 (1970), p. 296. See, however, D.N. Hylton, who maintains that "reservations modify a treaty only in regard to specific provisions" ("Default Breakdown: the Vienna Convention on the Law of Treaties: Inadequate Framework on Reservations", *Vanderbilt Journal of International Law*, vol. 27 (1994), No. 2, p. 422).

[594] See the commentary to guideline 1.1.1 (Object of reservations), *Yearbook ... 1999*, vol. II, Part Two, p. 94, paras. (6) and (7).

[595] *Ibid.*, pp. 93–94, para. (5).

[596] Guideline 1.1.1 (Object of reservations) reads: "A reservation purports to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects, in their application to the State or to the international organization which formulates the reservation" (*Yearbook ... 1999*, vol. II, Part Two, p. 93).

[597] "Mediante le riserve, gli Stati possono produrre l'effetto di restringere il campo d'applicazione materiale o soggetivo della convenzione, fino all'esclusione di una o più disposizioni dell'accordo o alla non applicazione per determinati soggetti, oppure manifestare la volontà di accettare le disposizioni con modalità restrittive o con limiti di ordine temporale o territoriale." ["By means of reservations, States can reduce the material or subjective scope of application of a treaty to the point of exclusion of one or more provisions of the treaty or its non-application to specific subjects, or again they can demonstrate willingness to accept the provisions of the treaty in accordance with restrictive modalities or by attaching to the limitations of a temporal or territorial nature."] (P. de Cesari, "Riserve, dichiarazioni e facolta' delle convenzioni dell'Aja di diritto internazionale privato", in Tullio Treves (ed.), "Six Studies on Reservations", *Comunicazioni e Studi*, vol. 22 (2002), p. 167, para. 8).

[598] On the matter of reciprocity, see below guideline 4.2.5 and the commentary thereto.

- The point that it may have an effect not only on specific provisions but on the "treaty as a whole with respect to certain specific aspects"

(10) The two following paragraphs, which provide a more detailed description of the modifying and excluding effects of established reservations, respectively, are constructed along the same lines. In each the first sentence concerns the rights and obligations (or the lack thereof) of the author of the reservation.[599] The second sentence deals with the rights and obligations of the other parties to the treaty with regard to which the reservation is established and in doing so it echoes the principle established in article 21, paragraph 1 (b) of the Vienna Conventions and lays down the principle of reciprocity in the application of the reservation.

(11) Paragraph 2 of guideline 4.2.4 explains the consequences of an established reservation when the latter excludes the legal effect of one or more provisions of the treaty.

(12) There are many examples of such reservations.[600] Excluding reservations are often used, in particular to exclude compulsory dispute settlement procedures. Pakistan, for instance, notified the Secretary-General of the following reservation when it acceded on 17 June 2009 to the International Convention for the Suppression of the Financing of Terrorism:

> The Government of the Islamic Republic of Pakistan does not consider itself bound by article 24, paragraph 1, of the International Convention for the Suppression of the Financing of Terrorism. The Government of Islamic Republic of Pakistan hereby declares that, for a dispute to be referred to the International Court of Justice, the agreement of all parties shall in every case be required.[601]

(13) A considerable number of reservations also purport to exclude the application of substantive provisions of the treaty. Egypt, for example, formulated a reservation to the Vienna Convention on Diplomatic Relations purporting to exclude the legal effect of article 37, paragraph 2:

> Paragraph 2 of article 37 shall not apply.[602]

Cuba also made a reservation purporting to exclude the application of article 25, paragraph 1, of the Convention on Special Missions:

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[599] It should also be noted that the wording of the first sentence of both paragraphs 2 and 3 of guideline 4.2.4 seeks to remove the ambiguity stemming from the definition of "reservation" in the English version of article 2, paragraph 1 (d) of the Vienna Conventions: "a unilateral statement made by a State [or by an international organization] ... whereby it purports to exclude or modify the legal effect of certain provisions of a treaty". In this wording the pronoun "it" could refer to either the statement or the State. The French version, by using "*il*" before "*vise à exclure*" is unequivocal and clearly shows that the word "it" in English refers to the author of the reservation. As in other contexts, the same pronoun is used to refer not to the author's intent but to the effects of the reservation (see guideline 1.1.1) and in order to avoid any ambivalence resulting from the definition of "reservation" in the English text of the 1969 and 1986 Vienna Conventions, the Commission had chosen wording that dispels any doubts; the first clause refers to the effects of reservations, while the second covers the rights and obligations of the author of the reservation.

[600] See also guideline 1.1.8 and the commentary thereto (*Yearbook ... 2000*, vol. II, Part Two, pp. 108–112).

[601] See also the similar reservations of Algeria, Andorra, Bahrain, Bangladesh, China, Colombia, Cuba, Egypt, El Salvador, Saudi Arabia, the United Arab Emirates, the United States of America, etc. (*Multilateral Treaties* ..., footnote 341 above, chap. XVIII.11). See also the many reservations excluding the application of article IX of the Convention on the Prevention and Punishment of the Crime of Genocide (*ibid.*, chap. IV.1).

[602] *Ibid.*, chap. III.3. See also the reservation formulated by Morocco (*ibid.*).

> The Revolutionary Government of the Republic of Cuba enters an express reservation with regard to the third sentence of paragraph 1, article 25 of the Convention and consequently does not accept the assumption of consent to enter the premises of the special mission for any of the reasons mentioned in that paragraph or for any other reasons.[603]

As another example, the Government of Rwanda formulated a reservation to the Convention on the Elimination of All Forms of Racial Discrimination worded as follows:

> The Rwandese Republic does not consider itself as bound by article 22 of the Convention.[604]

(14) Applying article 21, paragraph 1 (a), of the Vienna Conventions to reservations of this kind is relatively easy. An established reservation modifies the legal effect of the treaty provision to which the reservation relates "to the extent of the reservation", that is to say by simply excluding any legal effect of that treaty provision. Once the reservation is established, everything in the treaty relations between the author of the reservation and the parties with regard to which the reservation is established takes place as if the treaty did not include the provision referred to in the reservation. Excluding reservations thus have a "contraregulatory effect".[605] The author of the reservation is no longer bound by the obligation stemming from the treaty provision in question, but is in no way prevented from complying with it (and being held to it if it should be the case that the treaty norm enunciates a customary obligation). It follows logically that the other States or international organizations with regard to which the reservation is established have waived their right to demand performance of the obligation stemming from the treaty provision in question in the context of their treaty relationship with the author of the reservation.

(15) Paragraph 2 of guideline 4.2.4 expresses this effect of excluding reservations in simple terms intended to leave no doubt that the author of the reservation is not bound by any obligation stemming from the treaty provision to which the excluding reservation relates and cannot claim any right stemming from it. And, as the word "likewise" in the second sentence indicates, the same is true conversely for the other parties with regard to which the reservation is established.

(16) It should be noted, moreover, that the exclusion by means of a reservation of an obligation stemming from a provision of the treaty does not automatically mean that the author of the reservation refuses to fulfil the obligation. The author of the reservation may simply wish to exclude the application of the treaty obligation within the legal framework established by the treaty. A State or an international organization may be in full agreement with a rule enunciated in a treaty provision, but nevertheless reject the competence of a treaty body or a judicial authority to rule on a dispute concerning the application and interpretation of that rule. While remaining entirely free to comply with the obligation established within the treaty framework, the author nevertheless excludes the applicability to itself of the control mechanisms established by the treaty.[606]

(17) The concrete effect of a modifying reservation — the situation contemplated in paragraph 3 of guideline 4.2.4 — is significantly different and more difficult to grasp. Unlike the author of an excluding reservation, the author of a modifying reservation is not

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[603] *Ibid.*, chap. III.9.

[604] *Ibid.*, chap. IV.2.

[605] F. Horn, footnote 321 above, p. 84.

[606] See also guideline 3.1.8 (Reservations to a provision reflecting a customary norm) and the commentary thereto, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), pp. 87–98, and in particular paragraph (7) of the commentary.

seeking to be released from its obligations stemming from one or more treaty provisions in order to regain freedom of action within the treaty's legal framework. Rather, it is seeking to replace the obligation stemming from the treaty provision with a different one.

(18) By such a modifying reservation the author, once the reservation is established, does not simply purport to be released from all treaty obligations stemming from the provisions to which the reservation relates. The effect of the reservation is to replace the obligation initially provided for in the treaty by another one which is provided for in the reservation. In other words, the obligation stemming from the treaty provision referred to in the reservation is replaced or modified by the one set forth in the reservation in the treaty relations between its author and the State or international organization in regard to which the reservation is established. Or, to be more precise, the established reservation leads to replacement of the obligation and the correlative right stemming from the treaty provision in question with the obligation and the correlative right provided for in the reservation or stemming from the treaty provision as modified by the reservation.

(19) However, the substitution of obligations has effect only with respect to the author of the reservation and has implications only for the other parties with regard to which the reservation is established. The phrase "as modified by the reservation", which is repeated twice in paragraph 3 and refers both to the rights and obligations of the author of the reservation and to those of the other parties with regard to which the reservation is established, is intended to draw attention to the diversity of these effects.

(20) An example of the first type of modifying reservation — those that modify only the rights and obligations of the author of the reservation *vis-à-vis* the other parties without affecting the content of the rights and obligations of the latter — is the reservation of the Federal Republic of Germany to the Convention on Psychotropic Substances:

> In the Federal Republic of Germany, manufacturers, wholesale distributors, importers and exporters are not required to keep records of the type described [in paragraph 2 of article 11 of the Convention] but instead to mark specifically those items in their invoices which contain substances and preparations in Schedule III. Invoices and packaging slips showing such items are to be preserved by these persons for a minimum period of five years.[607]

By means of this reservation, Germany thus purports not simply to exclude the application of article 11, paragraph 2, of the Convention on Psychotropic Substances, but rather to replace the obligation stemming from that provision with another, different one that applies only to the author of the reservation.

(21) The Finnish reservation to article 18 of the Convention on Road Signs and Signals of 1968 is another example that clearly shows that the author of the reservation is not simply releasing itself from its obligation under the treaty, but is replacing it, at least in part, with another obligation that in no way modifies the rights and obligations of the other parties:

> Finland reserves the right not to use signs E,9a or E,9b to indicate the beginning of a built-up area, nor signs E,9c or E,9d to indicate the end of such an area. Instead of them symbols are used. A sign corresponding to sign E,9b is used to indicate the name of a place, but it does not signify the same as sign E,9b.[608]

(22) On the other hand, the reservation that Israel formulated to the first, second and fourth Geneva Conventions in relation to the articles on a distinctive sign for medical

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[607] *Multilateral Treaties ...* , footnote 341 above, chap. VI.6.

[608] *Ibid.*, chap. XI.B.20.

personnel,[609] while it does not appear to modify directly the content of the relevant provisions, except with respect to Israel itself, does impose corresponding obligations on the other parties with regard to which it is established. The reservation to the first Geneva Convention reads as follows:

> Subject to the reservation that, while respecting the inviolability of the distinctive signs and emblems of the Convention, Israel will use the Red Shield of David as the emblem and distinctive sign of the medical services of her armed forces.[610]

Israel thereby imposes on the other parties with regard to which its reservation is established the obligation, not originally provided for, to respect a new emblem in their relations with Israel.

(23) Similarly, the reservations of the Union of Soviet Socialist Republics to article 9 of the Convention on the High Seas[611] concluded in Geneva in 1958 and to article 20 of the Convention on the Territorial Sea and the Contiguous Zone[612] are clearly intended to establish a treaty regime that would impose on other parties to those conventions obligations which they did not undertake when ratifying or acceding to them. The same could be said about the reservations of Denmark, Ireland, Spain, Sweden and the United Kingdom to the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations,[613] since they modify, *ratione personae*, the treaty regime by calling for the shifting of the obligation from one entity to another.

(24) While it is not mechanical, excluding reservations lend themselves better to reciprocity than do modifying reservations (especially those in the first category, which modify only the content of the rights and obligations of their author). The Commission has nevertheless thought it necessary to refer, in the second sentence of both paragraphs 2 and 3 of guideline 4.2.4, to the general principle of reciprocal application of reservations set out in article 21, paragraph 1 (b), of the Vienna Conventions. These references should be understood as being without prejudice to the exceptions cited in guideline 4.2.5.

(25) The principle of reciprocal application of reservations means that as soon as a reservation has been established, it can be invoked not only by its author but also by any other party in regard to which it has acquired this status, as shown by the second sentence in paragraphs 2 and 3 of guideline 4.2.4. The reservation creates between its author and the parties with regard to which it is established a special regulatory system which is applied on

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[609] This reservation was formulated following the rejection of an amendment proposed by Israel at the 1949 Diplomatic Conference to include the Red Shield of David among the distinctive signs for medical personnel. Israel thereupon formulated three similar reservations upon signing the Geneva Conventions (on 8 December 1949), which it confirmed upon ratification (6 July 1951).

[610] Available from http://www.icrc.org/hl.

[611] "The Government of the Union of Soviet Socialist Republics considers that the principle of international law according to which a ship on the high seas is not subject to any jurisdiction except that of the flag State applies without restriction to all government ships" (*Multilateral Treaties* ..., footnote 341 above, chap. XXI.2).

[612] "The Government of the Union of Soviet Socialist Republics considers that government ships in foreign territorial waters have immunity and that the measures mentioned in this article may therefore be applied to them only with the consent of the flag State" (*ibid*., chap. XXI.1).

[613] These reservations all seek to preserve the delegation of certain areas of responsibility to the European Union. They are drafted in nearly identical terms, despite some slight variations in wording. The reservation of Ireland, for example, reads: "Whereas to the extent to which certain provisions of the Tampere Convention on the Provision of Telecommunications Resources for Disaster Mitigation and Relief Operations ('the Convention') fall within the responsibility of the European Community, the full implementation of the Convention by Ireland has to be done in accordance with the procedures of this international organisation" (*ibid*., chap. XXV.4).

a reciprocal basis. In this regard, Waldock has explained that "reservations always work both ways".[614] This idea is also to be found in article 21, paragraph 1 (b), of the Vienna Conventions, which, in its 1986 version, reads as follows:

> 1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:
>
> (a) ...
>
> (b) modifies those provisions [of the treaty which is their subject] to the same extent for that other party in its relations with the reserving State or international organization.

(26) It follows that the author of the reservation is not only released from compliance with the treaty obligations which are the subject of the reservation but also loses the right to require the State or international organization with regard to which the reservation is established to fulfil the treaty obligations that are the subject of the reservation. In addition, the State or the international organization with regard to which the reservation is established is released from compliance with the obligation which is the subject of the reservation with respect to the reserving State or organization.

(27) This principle of reciprocal application is based on common sense.[615] The regulatory system governing treaty relations between the two States concerned reflects the common denominator of their respective commitments resulting from the overlap — albeit partial — of their wills.[616] It follows "directly from the consensual basis of treaty regulations",[617] which has a significant influence on the general regime of reservations of the Vienna Convention, as Waldock explains in his first report on treaty law:

> A reservation operates reciprocally between the reserving State and any other party to the treaty, so that both are exempted from the reserved provisions in their mutual relations.[618]

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[614] "General Course on Public International Law", *Recueil des cours de l'Académie du droit international de la Haye* (RCADI), vol. 106 (1962-II), p. 87.

[615] Dionisio Anzilotti believed that "*l'effetto della riserva è che lo Stato riservante non è vincolato dalle disposizioni riservate:* naturalmente, *le altre parti non sono vincolate verso di lui, di guisa che, nei rapporti tra lo Stato riservante e gli altri, le disposizioni riservate sono come se non facessero parte del trattato*" ["the effect of the reservation is that the reserving State is not bound by the provisions which are the subject of the reservation; *naturally*, the other parties are not bound in respect to it; thus, in relations between the reserving State and the others, it is as if the provisions which are the subject of the reservation are not part of the treaty".] (*Corso di diritto internazionale*, vol. I (*Introduzione-Teorie generali*), (Padova: CEDAM, 1955), p. 355) (emphasis added).

[616] R. Baratta, footnote 401 above, p. 291: "*Si è poi visto che l'orientamento che emerge della pratica internazionale appare in sintonia con il principio consensualistico posto a fondamento del diritto dei trattati: la norma riservata è priva di giuridicità non essendosi formato l'accordo fra tali soggetti a causa dell'apposizione della riserva stessa.*" ["We have seen, moreover, that the trend resulting from international practice seems to be linked with the consensual principle, a basic element of treaty law: the rule which is the subject of the reservation loses its juridical status, absent an agreement between subjects of law due to the fact of the formulation of the reservation itself."]

[617] Sir Humphrey Waldock, first report on the law of treaties (A/CN.4/144), *Yearbook ... 1962*, vol. II, p. 68, para. 21. The Commission endorsed this explanation in the comments on draft article 19 (which became article 21 of the 1969 Vienna Convention) adopted on second reading (*Yearbook ... 1966*, vol. II, p. 209, para. (1) of the commentary).

[618] Sir Humphrey Waldock, first report on the law of treaties, A/CN.4/144, *Yearbook ... 1962*, vol. II, p. 68, para. 21.

(28) The International Court of Justice has presented the problem of the reciprocal application of the optional declarations of acceptance of compulsory jurisdiction contained in article 36, paragraph 2, of the Statute of the Court in a comparable, although slightly different, way. In its judgment in the *Norwegian Loans* case, it stated that:

> since two unilateral declarations are involved, such jurisdiction is conferred upon the Court only to the extent to which the two Declarations coincide in conferring it. A comparison between the two Declarations shows that the French Declaration accepts the Court's jurisdiction within narrower limits than the Norwegian Declaration; consequently, the common will of the Parties, which is the basis of the Court's jurisdictions, exists within these narrower limits indicated by the French reservation.[619]

(29) The reciprocity of the effects of the reservation also rebalances the inequalities created by the reservation in the bilateral relations between the author of the reservation and the other States or international organizations with regard to which the reservation is established. These latter cannot, through the reservations mechanism, be bound by more obligations towards the author of the reservation than the latter itself is ready to assume.[620] Professor Simma believed in this regard that:

> *Wer sich bestimmten Vertragsverpflichtungen durch einen Vorbehalt entzogen hat, kann selbst auch nicht verlangen, im Einklang mit den vom Vorbehalt erfassten Vertragsbestimmungen behandelt zu werden* [Whoever has withdrawn from certain treaty obligations by a reservation cannot claim treatment in accordance with the treaty provisions which are the subject of the reservation].[621]

(30) The reciprocal application of a reservation follows directly from the idea of the reciprocity of international commitments and of give-and-take between the parties and conforms to the maxim *do ut des*.

(31) Furthermore, the reciprocity of the effects of the reservation plays a not negligible regulatory, even deterrent, role in the exercise of the widely recognized freedom to formulate a reservation: the author of the reservation must bear in mind that the effects of the reservation are not only to the author's benefit; the author also runs the risk of the reservation being invoked against it. On this subject, Waldock has written:

> There is of course another check upon undue exercise of the freedom to make reservations in the fundamental rule that a reservation always works both ways, so that any other State may invoke it against the reserving State in their mutual relations.[622]

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[619] Judgment of 6 July 1957, *Case of Certain Norwegian Loans* (*France v. Norway*), *I.C.J. Reports, 1957*, p. 23.

[620] See *Yearbook ... 1966*, vol. II, p. 206, para .13 of the comments on draft articles 16 and 17. Roberto Baratta has rightly maintained that the reciprocity of the effects of a reservation has proven to be a "*strumento di compensazione nelle mutue relazioni pattizie tra parti contraenti; strumento che è servito a ristabilire la parità nel* quantum *degli obblighi convenzionali vicendevolmente assunti, parità unilateralmente alterata da una certa riserva*". ["Compensatory mechanism in the mutual relations between contracting parties which has served to restore the balance in the *quantum* of reciprocally assumed treaty obligations that was unilaterally altered by a given reservation."] (footnote 401 above, p. 292).

[621] *Das Reziprozitätselement im Zustandekommen völkerrechtlicher Verträge* (Berlin: Duncker & Humblot, 1972), p. 60.

[622] *Op. cit.*, footnote 614 above, p. 87. See also Francesco Parisi, Catherine Ševcenko, "Treaty Reservations and the Economics of Article 21 (1) of the Vienna Convention", *Berkeley Journal of International Law*, vol. 21 (2003), pp. 1–26.

(32) Reciprocal application thus cuts both ways and "contributes significantly to resolving the inherent tension between treaty flexibility and integrity".[623] In a way, this principle appears to be a complement to, and is often far more of a deterrent than, the requirement of permissibility of the reservation, owing to the uncertain determination of permissibility in a good number of cases.

(33) A number of reservation clauses thus make express reference to the principle of reciprocal application of reservations,[624] whereas other treaties recall the principle of reciprocal application in more general terms.[625] However, such express clauses would appear to be superfluous.[626] The principle of reciprocity is recognized not only as a general principle,[627] but also as a principle that applies automatically, requiring neither a specific clause in the treaty nor a unilateral declaration by the States or international organizations that have accepted the reservation to that effect.[628]

(34) Draft article 21 adopted on first reading by the Commission in 1962 was, however, not very clear as regards the question of automatic nature of the reciprocity principle, in that it provided that the reservation would operate "reciprocally to entitle any other State Party to the treaty to claim the same modification of the provisions of the treaty in its relations with the reserving State".[629] This formulation of the rule implied that the other

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[623] F. Parisi, C. Ševcenko, *ibid.*, p. 16. See also R. Baratta, footnote 401 above, pp. 295–296.

[624] This was already the case in article 20, paragraph 2, of The Hague Convention on Conflict of Nationality Laws of 1930 ("The provisions thus excluded cannot be applied against the Contracting Party who has made the reservation nor relied on by that Party against any other Contracting Party"). Other examples are found in The Hague Conventions on International Private Law (for these reservation clauses, see Ferenc Majoros, *Clunet (JDI)*, 1974, p. 90 et seq.), in a number of conventions concluded within the United Nations Economic Commission for Europe (see P.-H. Imbert, footnote 522 above, pp. 188–191 and p. 251) and in some conventions drawn up and concluded within the Council of Europe. The Model Final Clauses for Conventions and Agreements Concluded within the Council of Europe adopted by the Council of Ministers in 1980 proposes the following provision relating to reciprocity of the effects of reservation: "A Party which has made a reservation in respect of a provision of [the Agreement concerned] may not claim the application of that provision by any other Party; it may, however, if its reservation is partial or conditional, claim the application of that provision insofar as it has itself accepted it" (art. e, para. 3). See also F. Horn, footnote 321 above, pp. 146 and 147.

[625] See, for example, article 18 of the Convention on the Recovery Abroad of Maintenance ("A Contracting Party shall not be entitled to avail itself of this Convention against other Contracting Parties except to the extent that it is itself bound by the Convention") or article XIV of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound by the Convention").

[626] P.-H. Imbert, footnote 522 above, p. 252; Ferenc Majoros, footnote 624 above, pp. 83 and 109. Majoros criticizes the introduction of clauses reiterating the reciprocity principle into treaties "for reasons of clarity and legal stability" (*ibid.*, p. 81).

[627] See Ferenc Majoros, footnote 624 above, pp. 83 and 109; R. Baratta, footnote 401 above, p. 243 et seq.; F. Horn, footnote 321 above, p. 148; see also B. Simma, footnote 621 above, pp. 60–61.

[628] R. Baratta, footnote 401 above, pp. 227 et seq. and 291; Ferenc Majoros, footnote 624 above, pp. 83 and 109; F. Parisi and C. Ševcenko, footnote 622 above. There have, however, been cases where, simply as a precaution, States have made their acceptance conditional upon the reciprocal application of the reservation. It is in this sense that we must understand the United States declarations in response to the reservation by Romania and the USSR to the Convention on Road Traffic of 1949, whereby the Government of the United States specified that it "has no objection to [these] reservation[s] but 'considers that it may and hereby states that it will apply [these] reservation[s] reciprocally with respect to [their respective author States]'". *Multilateral Treaties* ..., footnote 341 above, chap. XI.B.1.

[629] *Yearbook ... 1962*, vol. II, p. 181.

contracting States should invoke the reservation in order to benefit from the effects of reciprocity. Following the comments of Japan and the United States,[630] the text was recast so as to establish that the reservation produces *ipso jure* the same effect for the reserving State and the State accepting it.[631] Although it still underwent a number of drafting changes,[632] the text finally adopted by the Commission in 1965 thus clearly expresses the idea of automaticity.

4.2.5 Non-reciprocal application of obligations to which a reservation relates

Insofar as the obligations under the provisions to which the reservation relates are not subject to reciprocal application in view of the nature of the obligations or the object and purpose of the treaty, the content of the obligations of the parties other than the author of the reservation remains unaffected. The content of the obligations of those parties likewise remains unaffected when reciprocal application is not possible because of the content of the reservation.

Commentary

(1) As its title indicates, guideline 4.2.5 deals with exceptions to the general principle of reciprocal application of a reservation as between its author and the other parties to the treaty with regard to which the reservation is established.

(2) Although the second sentences of paragraphs 2 and 3 of guideline 4.2.4 reflect the principle of the reciprocal application of reservations — both reproducing the idea set out in article 21, paragraph 1 (b), of the Vienna Conventions — guideline 4.2.5 emphasizes that this principle is not absolute.[633] It cannot, in particular, find application in cases where a rebalancing between the obligations of the author of the reservation and the State or international organization with regard to which the reservation is established is unnecessary or proves impossible. This is the case essentially because of the nature of the obligation to which the reservation relates, the object and purpose of the treaty or the content of the reservation itself.

(3) The first sentence of guideline 4.2.5 covers the first of these hypotheses: the case in which the reciprocal application of the reservation is excluded because of the nature of the obligation to which the reservation relates or the object and purpose of the treaty; it can be difficult, moreover, to distinguish between these two sub-categories. If the treaty is not itself based on reciprocity of rights and obligations between the parties, a reservation can produce no such reciprocal effect.

(4) A typical example is afforded by the human rights treaties.[634] The fact that a State formulates a reservation excluding the application of one of the obligations contained in such a treaty does not release a State which accepts the reservation from respecting that obligation to the extent that the obligation concerned is not reciprocal, despite the existence of the reservation. To the same extent, these obligations apply not in an inter-State relationship between the reserving State and the State which has accepted the reservation,

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[630] *Yearbook ... 1966*, vol. II, pp. 303 and 351. See also the comments by Austria (*ibid.*, p. 282).

[631] See Sir Humphrey Waldock, fourth report on the law of treaties (A/CN.4/177 and Add.1 and 2), *Yearbook ... 1965*, vol. II, p. 58.

[632] For the final text of draft article 19, see *Yearbook ... 1966*, vol. II, p. 227.

[633] B. Simma, footnote 621 above, p. 61; R. Baratta, footnote 401 above, p. 292; D.W. Greig, footnote 353 above, p. 139; F. Horn, footnote 321 above, p. 148.

[634] See the first report on the law and practice relating to reservations to treaties, A/CN.4/470, *Yearbook ... 1995*, vol. II, Part One, p. 148, para. 138. See also the second report on reservations to treaties, A/CN.4/477/Add.1, *Yearbook ... 1996*, vol. II, Part One, p. 65, paras. 148 to 154.

but simply in a State-human being relationship. The Human Rights Committee considered in this respect in its general comment No. 24 that:

> Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction.[635]

For this reason, the Committee continues, the human rights treaties, "and the Covenant [on Civil and Political Rights] specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-State reciprocity has no place".[636]

(5) Moderating this formulation which may appear too absolute, the phrase "insofar as", with which guideline 4.2.5 begins, aims to show that even if the nature of the obligation or the object and purpose of the treaty as a whole exclude the reciprocity of reservations, elements of reciprocity may nevertheless remain in the relations between the author of the reservation and the other parties to the treaty. Thus, for example, it is clear that a State or international organization that has made a reservation cannot invoke the obligation excluded or modified by that reservation and require the other parties to fulfil it – even though the other parties remain bound by the obligation in question. This also means that guideline 4.2.5 is without effect on the normal operation of the reservation in the relations among the other parties (whose obligations it does not modify);[637] this is the meaning of the phrase "the content of the obligations of the parties other than the author of the reservation remains unaffected" at the end of the first sentence of guideline 4.2.5.

(6) Moreover, the human rights treaties are not, however, the only ones that do not lend themselves to reciprocity. That effect is also absent from treaties establishing obligations owed to the community of contracting States. Examples can be found in treaties on commodities,[638] in environmental protection treaties, in some demilitarization or disarmament treaties[639] and also in international private law treaties providing for uniform law.[640]

(7) In all of these situations, the reservation cannot produce a reciprocal effect in the bilateral relations between its author and the State or international organization with regard to which it is established. A party owes an obligation towards all the other parties to the treaty. Thus the reverse effect of the reservation has "nothing on which it can 'bite' or operate".[641]

(8) As Roberto Baratta has pointed out:

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[635] CCPR/C/21/Rev.1/Add.6, 11 November 1994, para. 8. See also M. Coccia, footnote 315 above, p. 37; P.-H. Imbert, footnote 522 above, p. 153; Michel Virally, "Le principe de réciprocité dans le droit international contemporain", *RCADI*, vol. 122 (1967-III), pp. 26 and 27.

[636] CCPR/C/21/Rev.1/Add.6, para. 17.

[637] See guideline 4.6 below.

[638] H.G. Schermers, "The Suitability of Reservations to Multilateral Treaties", *Nederlands Tijdschrift voor Internationaal Recht*, vol. VI (1959), No. 4, p. 356. See also D.W. Greig, footnote 353 above, p. 140.

[639] F. Horn, *op. cit.*, footnote 321 above, pp. 164–165.

[640] On the conventions of The Hague Conference on International Private Law, see Patrizia de Cesari, footnote 597 above, pp. 149–174, and Ferenc Majoros, footnote 624 above, pp. 73–109.

[641] G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, vol. 1 (Cambridge: Grotius Publications, 1986), p. 412.

> *anche in ipotesi di riserve a norme poste dai menzionati accordi l'effetto di reciprocità si produce, in quanto né la prassi, né i princìpi applicabili in materia inducono a pensare che lo State riservante abbia un titolo giuridico per pretendere l'applicazione della dispositione da esso riservata rispetto al soggetto non autore della riserva. Resta nondimeno, in capo a tutti i soggetti che non abbiano apposto la stessa riserva, l'obbligo di applicare in ogni caso la norma riservata a causa del regime solidaristico creato dall'accordo.*
>
> [even on the assumption of reservations to the norms enunciated in the above-mentioned agreements, the effect of reciprocity is produced, as neither practice nor the principles applicable suggest that the reserving State would have a legal right to call for the application of the provision to which the reservation relates by a subject which is not the author of the reservation. There nonetheless remains the obligation for all subjects which have not formulated the reservation to apply in all cases the norm to which the reservation relates, by virtue of the regime of solidarity established by the agreement.][642]

(9) This, moreover, was the thinking underlying the model clause on reciprocity adopted by the Council of Ministers of the Council of Europe in 1980:

> A Party which has made a reservation in respect of a provision of [the agreement concerned] may not claim the application of that provision by any other Party; it may, however, if its reservation is partial or conditional, claim the application of that provision insofar as it has itself accepted it".[643]

(10) The second sentence of guideline 4.2.5 concerns the second exception to the general principle of the reciprocal application of reservations: a situation when "reciprocal application is not possible because of the content of the reservation".

(11) This situation arises, for example, in the case of reservations purporting to limit the territorial application of a treaty. Reciprocal application of such reservation is quite simply not possible in practice.[644] Similarly, reciprocal application of the effects of the reservation is also excluded if it was motivated by situations obtaining specifically in the reserving State.[645] Thus, the reservation formulated by Canada purporting to exclude peyotl[646] from the application of the Convention, formulated solely because of the presence in Canadian territory of groups which use in their "magical or religious ceremonies" certain psychotropic substances that would normally fall under the Convention regime,[647] could not be invoked in its own favour by another party to the Convention unless if it was confronted with the same situation.

(12) The principle of reciprocal application of reservations may also be limited by reservation clauses contained in the treaty itself. An example is the Convention on Customs Facilities for Touring and its Additional Protocol of 1954. Article 20, paragraph 7, of the Convention provides:

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[642] R. Baratta, footnote 401 above, p. 294; D.W. Greig, footnote 353 above, p. 140.

[643] Committee of Ministers of the Council of Europe, 315th meeting, 1980, *Model Final Clauses for Conventions and Agreements concluded within the Council of Europe*, article e (3), available from http://conventions.coe.int/Treaty/EN/Treaties/Html/ClausesFinales.htm. On this subject, see Ferenc Majoros, footnote 624 above, p. 90, and F. Horn, footnote 321 above, pp. 146–147.

[644] P.-H. Imbert, footnote 522 above, p. 258; B. Simma, footnote 621 above, p. 61.

[645] F. Horn, footnote 321 above, pp. 165 and 166; P.-H. Imbert, footnote 522 above, pp. 258–260. See however the more cautious ideas relating to these assumptions formulated by Ferenc Majoros, *op. cit.*, footnote 624 above, pp. 83 and 84.

[646] This is a species of small cactus which has hallucinogenic psychotropic effects.

[647] *Multilateral Treaties* ... , footnote 341 above, chap. VI.16.

> No Contracting State shall be required to extend to a State making a reservation the benefit of the provisions to which such reservation applies. Any State availing itself of this right shall notify the Secretary-General accordingly and the latter shall communicate its decision to all signatory and contracting States.[648]

Even though this particular clause does not in itself exclude the application of the principle of reciprocal application, it deprives it of automaticity by making it subject to notification by the accepting State. Such notifications have been made by the United States of America in relation to the reservations formulated by Bulgaria, Romania and the USSR to the dispute settlement mechanism provided for in article 21 of that Convention.[649]

4.3 Effect of an objection to a valid reservation

Unless the reservation has been established with regard to an objecting State or organization, the formulation of an objection to a valid reservation precludes the reservation from having its intended effects as against that State or international organization.

Commentary

(1) Unlike acceptance of a valid reservation, an objection to a reservation may produce a variety of effects as between the author of the reservation and the author of the objection. The choice is left to a great extent (but not entirely) to the latter, which can vary the potential legal effects of the reservation-objection pair. For example, it may choose, in accordance with article 20, paragraph 4 (b), of the Vienna Conventions on the Law of Treaties, to preclude the treaty from entering into force as between itself and the reserving State by "definitely" expressing that intention. But the author of the objection may also elect not to oppose the entry into force of the treaty as between itself and the author of the reservation or, to put it more accurately, may refrain from expressing a contrary intention. In that case, if the treaty does in fact enter into force for the two parties,[650] the treaty relations between the author of the reservation and the author of the objection are modified in accordance with article 21, paragraph 3, of the Vienna Conventions. Thus, objections to a valid reservation may have a number of effects on the very existence of treaty relations or on their content, and those effects may vary with regard to the same treaty and the same reservation.

(2) The primary function and the basic effect of every objection are, however, very simple. Unlike acceptance, an objection constitutes its author's rejection of the reservation. As the International Court of Justice clearly stated in its 1951 advisory opinion,

> "no State can be bound by a reservation to which it has not consented".[651]

This is the fundamental effect of the same principle of mutual consent that underlies all treaty law and, in particular, the regime of reservations: the treaty is the consensual instrument par excellence, drawing its strength from the *will* of States. Reservations are "consubstantial" with the State's consent to be bound by the treaty.[652]

(3) Thus, the objection may be analysed first and foremost as the objecting State's refusal to consent to the reservation and, as such, it prevents the establishment of the reservation with respect to the objecting State or international organization within the

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[648] *Ibid.*, chap. XI.A.6.

[649] *Ibid.*, chap. XI.A.6 and A.7. See R. Riquelme Cortado, footnote 343 above, p. 212 (note 44).

[650] On the issue of when the treaty enters into force for the author of the reservation, see guidelines 4.2.1 and 4.2.3, 4.3.1 and 4.3.4 and the commentaries thereto.

[651] *I.C.J. Reports 1951*, p. 26. (See footnote 305 above.)

[652] See, for example, *Yearbook ... 1997*, vol. II, Part Two, p. 49, para. 83.

meaning of article 21, paragraph 1, of the Vienna Conventions and of guideline 4.1. As the Commission pointed out in its commentary to guideline 2.6.1 (Definition of objections to reservations):

> "The refusal to accept a reservation is precisely the purpose of an objection in the full sense of the word in its ordinary meaning".[653]

(4) Unlike an acceptance, an objection makes the reservation inapplicable as against the author of the objection. Clearly, this effect can be produced only where the reservation has not already been accepted (explicitly or tacitly) by the author of the objection. Acceptance and objection are mutually exclusive, and definitively so, at least insofar as the effects of acceptance are concerned. In this regard, guideline 2.8.12 states:

> "Acceptance of a reservation cannot be withdrawn or amended".[654]

The phrase introducing guideline 4.3 refers implicitly to this principle, even if the Commission chose not to make it too heavy — it serves to introduce section 4.3 as a whole — by including a specific reference.

(5) In order to highlight the fundamental function of objections, guideline 4.3, which begins the section of the Guide to Practice on the effect of an objection to a valid reservation, sets out the principle whereby an objection prevents the reservation from producing the effects intended by its author.[655] This provides an initial clarification of the meaning of the phrase "the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation", which appears at the end of article 21, paragraph 3, of the Vienna Conventions and the meaning of which is clarified further in guideline 4.3.5.

(6) The neutralization of a reservation's effect as it applies to the State or international organization that is the author of the objection is, however, far from being the answer to all the questions concerning the effects of an objection. The objection may in fact have several different effects, both on the entry into force of the treaty (as described in guidelines 4.3.1 to 4.3.4) and, once the treaty has entered into force for the author of the reservation and the author of the objection, on the content of the treaty relations thus established (dealt with in guidelines 4.3.5 to 4.3.7).

(7) There is, however, a case in which an objection does not produce the normal effects described in guideline 4.3: it is the case in which a State or organization member of an international organization formulates an objection to a reservation formulated by another State or another international organization to the constituent instrument of the organization. Such an objection, regardless of its content, would be devoid of legal effects. This is the meaning of guideline 2.8.11 according to which:

> "Guideline 2.8.7 does not preclude States or international organizations that are members of an international organization from taking a position on the permissibility or appropriateness of a reservation to a constituent instrument of the organization. Such an opinion is in itself devoid of legal effects".[656]

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[653] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), p. 191, para. (13) of the commentary.

[654] *Ibid., Sixty-fourth Session, Supplement No. 10* (A/64/10), p. 214.

[655] It will be recalled that guidelines 1.1 and 1.1.1 define reservations in terms of the intended object of the State or international organization formulating them.

[656] For the commentary to this guideline, see *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), pp. 250 and 251. Guideline 2.8.7 (Acceptance of a reservation to the constituent instrument of an international organization) reads: "When a treaty is a constituent

4.3.1 Effect of an objection on the entry into force of the treaty as between the author of the objection and the author of a reservation

An objection by a contracting State or by a contracting organization to a valid reservation does not preclude the entry into force of the treaty as between the objecting State or organization and the reserving State or organization, except in the case mentioned in guideline 4.3.4.

Commentary

(1) As the Commission indicated in its commentary to guideline 2.6.8, the Vienna Conventions do not give any indication of the time at which the intention to oppose the entry into force of the treaty must be expressed by the author of the objection.[657] The Commission did, however, conclude that, in accordance with the presumption established in article 20, paragraph 4 (b), of the Vienna Conventions, an objection not accompanied by a clear expression of such an intention does not preclude the entry into force of the treaty as between the author of the objection and the author of the reservation or, in certain cases, the entry into force of the treaty itself. This legal effect cannot be called into question by the subsequent expression of a contrary intention. This idea has already been expressed in guideline 2.6.8, which provides that the intention to oppose the entry into force of the treaty must have been expressed "before the treaty would otherwise enter into force between [the author of the objection and the author of the reservation]".[658] However, that guideline concerns the procedure for formulating the required intention and not its effects; it therefore seemed useful to reiterate that principle in the part of the Guide to Practice dealing with the legal effect of objections. Nevertheless, guideline 4.3.1 uses the expression "does not preclude the entry into force", which implies that the treaty was not in force as between the author of the reservation and the author of the objection when the reservation was made.

(2) Concretely, the consequence of the non-entry into force of the treaty as between the author of the reservation and the author of the objection is that no treaty relationship exists between them – even if, as is often the case, both can be considered parties to the treaty within the meaning of the Vienna Conventions. The mere fact that one party rejects the reservation and does not wish to be bound by the provisions of the treaty in its relations with the author of the reservation does not necessarily mean that the latter cannot become a contracting party in accordance with guideline 4.2.1. It is sufficient, under the general regime, for another State or another international organization to accept the reservation expressly or tacitly for the author of the reservation to be considered a contracting party to the treaty. The absence of a treaty relationship between the author of the maximum-effect objection and the author of the reservation does not *a priori* have any effect except between them.[659]

(3) In the absence of a definite expression of the contrary intention, an objection — which can be termed "simple" — to a valid reservation does not *ipso facto* result in the entry into force of the treaty as between the author of the reservation and the author of the objection, as is the case for acceptance. This, in fact, is one of the fundamental differences

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instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization."

[657] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), p. 199, para. (4) of the commentary.

[658] See also paragraph (5) of the commentary to guideline 2.6.8, *ibid.*, p. 199.

[659] The International Court of Justice recognized in 1951 that "such a decision will only affect the relationship between the State making the reservation and the objecting State". (*I.C.J. Reports 1951*, p. 26). See, however, paragraph (1) of the commentary to guideline 4.3.2 below.

between objection and acceptance, one which, along with other considerations, makes an objection not "tantamount to acceptance", contrary to what has often been asserted.[660] Pursuant to article 20, paragraph 4 (b), of the Vienna Conventions, reproduced in guideline 4.3.1, such an objection "does not preclude the entry into force of the treaty as between the objecting State or international organization and the reserving State or international organization". Yet while such an objection does not preclude the entry into force of the treaty, it remains neutral on the question as to whether or not the reserving State or organization becomes a contracting party to the treaty, and does not necessarily result in the entry into force of the treaty as between the author of the objection and the author of the reservation.

(4) This effect — or rather lack of effect — of a simple objection on the establishment or existence of a treaty relationship between the author of the objection and the author of the reservation derives directly from the wording of article 20, paragraph 4 (b), of the Vienna Conventions, as States sometimes point out when formulating an objection. The objection by the Netherlands to the reservation formulated by the United States of America to the International Covenant on Civil and Political Rights is a particularly eloquent example:

> "Subject to the proviso of article 21, paragraph 3 of the Vienna Convention of the Law of Treaties, these objections do not constitute an *obstacle* to the entry into force of the Covenant between the Kingdom of the Netherlands and the United States."[661]

The Netherlands deemed it useful to reiterate that its objection did not constitute an "obstacle" to the entry into force of the treaty with the United States, and that if the treaty came into force, their treaty relationship would have to be determined in accordance with article 21, paragraph 3, of the Vienna Convention.

(5) This effect — or lack of effect — of a simple objection on the entry into force of the treaty is spelled out in guideline 4.3.1, which, apart from a few minor changes, faithfully reproduces the language of article 20, paragraph 4 (b), of the 1986 Vienna Convention.

4.3.2 Entry into force of the treaty between the author of a reservation and the author of an objection

The treaty enters into force between the author of a valid reservation and the objecting contracting State or contracting organization as soon as the author of the reservation has become a contracting State or a contracting organization in accordance with guideline 4.2.1 and the treaty has entered into force.

Commentary

(1) Guideline 4.3.2 states the moment at which the treaty enters into force as between the author of the objection and the author of the reservation.

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[660] See comments by Mr. Yasseen (*Yearbook ... 1965*, vol. I, 814th meeting, 29 June 1965, p. 271, para. 5) and the doubts expressed by Mr. Tsuruoka (*ibid.*, 800th meeting, 11 June 1965, p. 174, para. 40); J.K. Koh, footnote 499 above, p. 102; M. Coccia, footnote 315 above, p. 35; G. Gaja, footnote 364 above, pp. 326–329; Jan Kiabbers, "Accepting the Unacceptable? A New Nordic Approach to Reservations to Multilateral Treaties", *Nordic Journal of International Law*, vol. 69 (2000), p. 181; Jean-Marie Ruda, "Reservations to Treaties", *Recueil des cours de l'Académie de droit international*, vol. 146 (1975-III), pp. 198–199; L. Sucharipa-Behrmann, footnote 353 above, p. 74; K. Zemanek, footnote 364 above, pp. 332–333. See also the first report on the law and practice relating to reservations to treaties (A/CN.4/470), *Yearbook ... 1995*, vol. II, Part Two, p. 31, para. 123.

[661] *Multilateral Treaties ...*, footnote 341 above, chap. IV.4; emphasis added.

(2) For this to happen, it is both necessary and sufficient for the treaty to enter into force and for both the author of the reservation and the author of the objection to be contracting parties thereto. In other words, the reservation must be established by the acceptance of another State or international organization, within the meaning of guideline 4.2.1. Hence, apart from the scenario envisaged in guideline 4.3.2, the entry into force of the treaty as between the author of the objection and the author of the reservation is in no way dependent on the objection itself, but rather on the establishment of the reservation; the objection plays no role in the establishment of the reservation.

(3) In concrete terms, a treaty that is subject to the general regime of consent as established in article 20, paragraph 4, of the Vienna Conventions enters into force for the reserving State or international organization only if the reservation has been accepted by at least one other contracting party (in accordance with article 20, paragraph 4 (c)). Only if the reservation is thus established may treaty relations be established between the author of the reservation and the author of a simple objection. Their treaty relations are, however, subject to the restrictions set out in article 21, paragraph 3, of the Vienna Conventions.[662]

4.3.3 Non-entry into force of the treaty for the author of a reservation when unanimous acceptance is required

If unanimous acceptance is required for the establishment of the reservation, any objection by a contracting State or by a contracting organization to a valid reservation precludes the entry into force of the treaty for the reserving State or organization.

Commentary

(1) The principle set out in guideline 4.3.2 is not applicable in cases in which, for one reason or another, unanimous acceptance by the contracting parties is required in order to "establish" the reservation, as in the case of a treaty that must be applied in its entirety,[663] for example. In this case, any objection — simple or qualified — has a much more significant effect with regard to the entry into force of the treaty between all the contracting parties, on the one hand, and the author of the reservation, on the other. The objection, in fact, prevents the reservation from being established as such. Even if article 20, paragraph 4 (b), of the Vienna Conventions were to apply to this specific case — which is far from certain, in view of the *chapeau* of the paragraph[664] — the reservation could not be established and, consequently, the author of the reservation could never become a contracting party. Here the objection — whether simple or qualified — constitutes an insurmountable obstacle both for the author of the reservation and for all the contracting parties in relation to the establishment of treaty relations with the author of the reservation. Only the withdrawal of the reservation or of the objection would resolve the situation.

(2) Although such a solution is already implied by guidelines 4.1.2 and 4.2.1, it is worth recalling this significant effect of an objection to a reservation that requires unanimous acceptance.

4.3.4 Non-entry into force of the treaty as between the author of a reservation and the author of an objection with maximum effect

An objection by a contracting State or by a contracting organization to a valid reservation precludes the entry into force of the treaty as between the objecting State or organization and the reserving State or organization, if the objecting State or organization has definitely expressed an intention to that effect in accordance with guideline 2.6.8.

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[662] See guideline 4.3.5 below.

[663] See guideline 4.1.2 above.

[664] "In cases not falling under the preceding paragraphs and unless the treaty otherwise provides ...".

Commentary

(1) Article 20, paragraph 4 (b), of the Vienna Conventions leaves no doubt as to the effect of an objection accompanied by the definitely expressed intention not to apply the treaty as between the author of the objection and the author of the reservation, in accordance with guideline 2.6.8 (Expression of intention to preclude the entry into force of the treaty).[665] In this case, the objection produces what is often referred to as its "maximum effect".

(2) This rule is the subject of draft guideline 4.3.4, which basically echoes the language of article 20, paragraph 4 (b), of the 1986 Vienna Convention.

(3) It is clear from that provision — which, apart from the reference to an international organization, is identical to the corresponding provision of the 1969 Convention — that, in principle, an objection to a reservation does not constitute an obstacle to the entry into force of the treaty as between the objecting State and the reserving State:

> "An objection by a contracting State or by a contracting organization to a reservation does not preclude the entry into force of the treaty as between the objecting State or organization and the reserving State or organization ...".

(4) While such a "simple" or "minimum-effect" objection[666] does not have as its immediate effect the entry into force of the treaty in relations between the two States, as is the case with an acceptance,[667] it does not preclude it.

(5) This is, however, a presumption that can be reversed by the author of the objection. Article 20, paragraph 4 (b), of the 1986 Vienna Convention continues: "... unless a contrary intention is definitely expressed by the objecting State or organization". Thus, the author of the objection may also elect to have no treaty relations with the author of the reservation, provided that it does so "definitely". These are often referred to as objections "with maximum effect".

(6) The system established by the Vienna Conventions corresponds to the approach taken by the International Court of Justice in 1951, according to which

> "... each State objecting to it will or will not ... consider the reserving State to be a party to the Convention".[668]

(7) The sense of the presumption may be surprising. Traditionally, in keeping with the principle of consent, the immediate effect of an objection was that the reserving State could not claim to be a State party to the treaty;[669] the "maximum" effect of an objection was thus

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[665] This guideline reads as follows: "When a State or international organization making an objection to a reservation intends to preclude the entry into force of the treaty as between itself and the reserving State or international organization, it shall definitely express its intention before the treaty would otherwise enter into force between them." (*Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), p. 168).

[666] For examples, see R. Riquelme Cortado, footnote 343 above, pp. 279–280; and F. Horn, footnote 321 above, pp. 170–172.

[667] Provided that the treaty itself is in force or becomes so as a result of accession by the accepting State (see draft guidelines 4.2.1 to 4.2.3 and paras. 239 to 252 of the fourteenth report on reservations to treaties (A/CN.4/614/Add.2)).

[668] *Advisory Opinion of 28 May 1951, I.C.J. Reports 1951* (see footnote 305 above), p. 26.

[669] P.-H. Imbert, footnote 522 above, pp. 155 and 260.

the rule. This outcome was necessary under the system of unanimity, in which a single objection compromised the unanimous consent of the other contracting States; no derogation was possible. The reserving State was required either to withdraw or to modify its reservation in order to become a party to the treaty. This rule was so self-evident that the Commission's first special rapporteurs, who held to the system of unanimity, did not even formulate it in any of their reports.

(8) The revolution introduced by the flexible system advocated by Waldock[670] did not, however, lead to a rejection of the traditional principle whereby "the objections shall preclude the entry into force of the treaty".[671] The Special Rapporteur did, however, allow for one major difference as compared with the traditional system, since he considered that objections had only a relative effect: rather than preventing the reserving State from becoming a party to the treaty, an objection came into play only in relations between the reserving State and the objecting State.[672]

(9) However, in order to align the draft with the solution proposed in the 1951 advisory opinion of the International Court of Justice,[673] and in response to the criticisms and misgivings expressed by many Commission members,[674] the radical solution proposed by Waldock was abandoned in favour of a simple presumption of maximum effect, leaving minimum effect available as an option. Draft article 20, paragraph 2 (b), as adopted on first reading, provided:

> "An objection to a reservation by a State which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the objecting and the reserving State, unless a contrary intention shall have been expressed by the objecting State."[675]

(10) However, during the debate on the Commission's draft in the Sixth Committee of the General Assembly, the Czechoslovak and Romanian delegations argued that the presumption should be reversed, so that the rule would "be more likely to broaden treaty relations among States and to prevent the formation of an undesirable vacuum in the legal ties between States".[676] Nonetheless, despite the favourable comments of some Commission members during the second reading of the draft,[677] this position was not retained in the Commission's final draft.

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[670] Alain Pellet, "Article 19 (1969)", in Olivier Corten and Pierre Klein (eds.), *Les Conventions de Vienne sur le droit des traités. Commentaire article par article* (Brussels: Bruylant, 2006, pp. 664–668), paras. 44–55.

[671] See draft article 19, paragraph 4 (c), presented by Waldock in 1962 in his first report on the law of treaties (A/CN.4/144; *Yearbook ... 1962*, vol. II, p. 62). This solution is, moreover, frequently offered as the only one that makes sense. See, for example, P. Reuter, footnote 330 above, p. 75, para. 132.

[672] On this point, see also the International Law Commission's commentary to draft article 20, paragraph 2 (b), (*Yearbook ... 1962*, vol. II, p. 181, para. 23).

[673] See note 668 above.

[674] See, for example, Tunkin (*Yearbook ... 1962*, vol. I, 653rd meeting, 29 May 1962, p. 156, para. 26, and 654th meeting, 30 May 1962, p. 161, para. 11), Rosenne (*ibid.*, 653rd meeting, 29 May 1962, para. 30), Jiménez de Aréchaga (*ibid.*, p. 158, para. 48), de Luna (*ibid.*, p. 160, para. 66), Yasseen (*ibid.*, 654th meeting, 30 May 1962, p. 161, para. 6). The Special Rapporteur was also in favour of introducing the presumption (*ibid.*, pp. 162, paras. 17 and 20).

[675] *Yearbook ... 1962*, vol. II, p. 175 and p. 181, para. 23.

[676] See the summary of the Czechoslovak and Romanian observations in the fourth report on the law of treaties, A/CN.4/177 and Add.1 and 2, *Yearbook ... 1965*, vol. II, p. 48.

[677] See comments by Mr. Tunkin (*Yearbook ... 1965*, vol. I, 799th meeting, 10 June 1965, p. 167, para. 39) and Mr. Lachs (*ibid.*, 813th meeting, 29 June 1965, p. 268, para. 62).

(11) The issue arose again, however, during the Vienna Conference. The proposals of Czechoslovakia,[678] Syria[679] and the Union of Soviet Socialist Republics[680] were aimed at reversing the presumption adopted by the Commission. Although it was characterized by some delegations[681] as innocuous, reversal of the presumption constituted a major shift in the logic of the mechanism of acceptances and objections.[682] That was why the notion of reversing the presumption had been rejected in 1968.[683] During the second session of the Conference, the USSR once again submitted a similar amendment,[684] which was debated at length, insisting on the sovereign right of each State to formulate a reservation and relying on the Court's 1951 advisory opinion.[685] That amendment was finally adopted[686] and the presumption of article 20, paragraph 4 (b), of the Convention, as proposed by the Commission, was reversed.

(12) The difficulties that the Conference encountered in adopting the amendment of the USSR show clearly that reversal of the presumption was not as innocuous as Waldock, then Expert Consultant to the Conference, had indicated. The problem is not merely that of "formulating a rule one way or the other":[687] this new formula, in particular, is at the origin of the doubts often expressed about the function of an objection and the real differences that exist between acceptance and objection.[688]

(13) Still, the presumption has never been called into question since the adoption of the 1969 Vienna Convention. During the drafting of the 1986 Convention it was simply transposed by the Commission. It therefore seemed neither possible nor truly necessary to undo the last-minute compromise that had been struck at the Vienna Conference in 1969. According to the presumption that is now part of positive international law, the general rule remains that an objection does not preclude the entry into force of a treaty – a principle recalled in guideline 4.3.1, the exception being where no treaty relationship exists between the author of the objection and the author of the reservation, an exception dealt with in guideline 4.3.4.

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[678] A/CONF.39/C.1/L.85, in *United Nations Conference on the Law of Treaties, Documents of the Conference* (A/CONF.39/11/Add.2), footnote 313 above, p. 135.

[679] A/CONF.39/C.1/L.94, *ibid.*

[680] A/CONF.39/C.1/L.115, *ibid.*, p. 133.

[681] The United Arab Republic considered, for example, that those amendments were purely drafting amendments (*United Nations Conference on the Law of Treaties, First Session, Summary records* (A/CONF.39/11), footnote 313 above, 24th meeting, 16 April 1968, p. 127, para. 24).

[682] See the statement by the representative of Sweden on this subject, who noted that "the International Law Commission's formula might have the advantage of dissuading States from formulating reservations" (*ibid.*, 22nd meeting, 11 April 1968, p. 117, para. 35). The representative of Poland supported the amendments precisely because they favoured the acceptance of reservations and the establishment of a contractual relationship (*ibid.*), which for Argentina "would be going too far in applying the principle of flexibility" (*ibid.*, 24th meeting, 16 April 1968, p. 129, para. 43).

[683] *Ibid.*, 25th meeting, 16 April 1968, p. 135, paras. 35 ff.

[684] A/CONF.39/L.3, *Documents of the Conference* (A/CONF.39/11/Add.2), note 678 above, pp. 265 and 266.

[685] Notably the answer to the second question, in which the Court held that the State that has formulated an objection "can in fact consider that the reserving State is not party to the Convention" (see note 668 above).

[686] By 49 votes to 21, with 30 abstentions (*United Nations Conference on the Law of Treaties, Second Session, Summary records* (A/CONF.39/11/Add.1), footnote 339 above, 10th plenary meeting, 29 April 1969, p. 35, para. 79).

[687] *Ibid.*, p. 34, para. 74. See also Pierre-Henri Imbert, footnote 522 above, pp. 156 and 157.

[688] F. Horn, footnote 321 above, pp. 172 and 173; see also footnote 660 above.

4.3.5 Effect of an objection on treaty relations

1. When a State or an international organization objecting to a valid reservation has not opposed the entry into force of the treaty between itself and the reserving State or organization, the provisions to which the reservation relates do not apply as between the author of the reservation and the objecting State or organization, to the extent of the reservation.

2. To the extent that a valid reservation purports to exclude the legal effect of certain provisions of the treaty, when a contracting State or a contracting organization has raised an objection to it but has not opposed the entry into force of the treaty between itself and the author of the reservation, the objecting State or organization and the author of the reservation are not bound, in their treaty relations, by the provisions to which the reservation relates.

3. To the extent that a valid reservation purports to modify the legal effect of certain provisions of the treaty, when a contracting State or a contracting organization has raised an objection to it but has not opposed the entry into force of the treaty between itself and the author of the reservation, the objecting State or organization and the author of the reservation are not bound, in their treaty relations, by the provisions of the treaty as intended to be modified by the reservation.

4. All the provisions of the treaty other than those to which the reservation relates shall remain applicable as between the reserving State or organization and the objecting State or organization.

Commentary

(1) The potential effects of an objection are quite diverse.[689] The outright non-application of the treaty between the author of the reservation and the author of the objection is the most straightforward hypothesis (objections with maximum effect, dealt with in guideline 4.3.4), but it is now infrequent, owing in particular to the reversal of the presumption in article 20, paragraph 4 (b), of the Vienna Conventions.[690] The vast majority of objections are now intended to produce a very different effect: rather than opposing the entry into force of the treaty *vis-à-vis* the author of the reservation, the objecting State seeks to modify the treaty relations by adapting them to its own position. Under article 21, paragraph 3, of the Vienna Conventions, bilateral relations in such cases are characterized in theory by the partial non-application of the treaty (objections with minimum effect, the consequences of which are complex and can vary depending on the content of the reservation; these are addressed in guideline 4.3.5). State practice, however, has developed other types of objections with effects other than those envisaged by article 21, paragraph 3, of the Vienna Conventions, either by excluding the application of certain provisions of the treaty that are not (specifically) addressed by the reservation (objections with intermediate effect, whose legal regime is set out in guideline 4.3.6) or by claiming that the treaty applies without any modification (objections with "super-maximum" effect, covered in guideline 4.3.7).

(2) Guideline 4.3.5, which describes the effects of a "simple" objection between the author of a reservation and the objecting State or international organization, consists of four paragraphs:

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[689] See paragraph (4) of the introductory commentary to the fourth part of the Guide to Practice.

[690] See paragraphs (1) to (5) of the commentary to guideline 4.3.4 above.

- The first paragraph, which is of a general introductory nature, reproduces the text of article 21, paragraph 3, of the 1986 Vienna Convention while specifying that it concerns only objections to a valid reservation
- The second and third paragraphs provide details regarding the effect of an objection on treaty relations, depending on whether the objection seeks to exclude or modify the provision or provisions at which the reservation is directed
- Lastly, the fourth paragraph states that, in principle, the objection has no effect on the other provisions of the treaty

(3) Under the traditional system of unanimity, it was unimaginable that an objection could produce an effect other than non-participation by the author of the reservation in the treaty:[691] the objection undermined unanimity and prevented the reserving State from becoming a party to the treaty. Since at the time that notion seemed self-evident, neither Brierly nor Fitzmaurice discussed the effects of objections to reservations, while Hersch Lauterpacht touched on them only briefly in his proposals *de lege ferenda*.[692]

(4) Nor did Waldock find it necessary in his first report to address the effects of an objection to a reservation. This is explained by the fact that, according to his draft article 19, paragraph 4 (c), the objection precluded the entry into force of the treaty in the bilateral relations between the reserving State and the objecting State.[693] Despite the shift away from this categorical approach in favour of a mere presumption, the draft articles adopted on first reading said nothing about the specific effect of an objection that did not preclude the entry into force of the treaty as between the author of the objection and the reserving State. Few States, however, expressed concern at that silence.[694]

(5) Nevertheless, a comment by the United States of America[695] drew the problem to the attention of the Special Rapporteur and the Commission. Although a situation where treaty relations were established despite an objection was deemed "unusual",[696] which was certainly true at the time, the United States still considered it necessary to cover such a situation and suggested the addition of a new paragraph, as follows:

> Where a State rejects or objects to a reservation but considers itself in treaty relations with the reserving State, the provisions to which the reservation applies shall not apply between the two States.[697]

(6) The arguments put forward by the United States convinced Waldock of the "logical" need to include this situation in draft article 21. He proposed a new paragraph, the wording of which differed significantly from the United States proposal:

> Where a State objects to the reservation of another State, but the two States nevertheless consider themselves to be mutually bound by the treaty, the provision

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[691] See D.W. Greig, footnote 353 above, p. 146; F. Horn, footnote 321 above, p. 170.

[692] Alternative drafts C and D of article 9, in his first report on the law of treaties (A/CN.4/63), *Yearbook ... 1953*, vol. II, p. 92.

[693] See paragraph (8) of the commentary to guideline 4.3.4 above.

[694] Only two States explicitly raised the issue. See the comments of the Danish Government (Sir Humphrey Waldock, fourth report on the law of treaties (A/CN.4/177 and Add.1 and 2), *Yearbook ... 1965*, vol. II, p. 46) and the comments of the United States (*ibid.*, p. 47 and p. 55).

[695] *Ibid.*, p. 55.

[696] *Ibid.*

[697] *Ibid.*

> to which the reservation relates shall not apply in the relations between those States.[698]

(7) The International Court of Justice had expressed a similar view in its 1951 advisory opinion:

> Finally, it may be that a State, whilst not claiming that a reservation is incompatible with the object and purpose of the Convention, will nevertheless object to it, but that an understanding between that State and the reserving State will have the effect that the Convention will enter into force between them, except for the clauses affected by the reservation.[699]

(8) The Commission engaged in a very lively debate on the text of paragraph 3 proposed by Waldock. The view of Castrén, who considered that the case of a reservation in respect of which a simple objection had been raised was already covered by draft article 21, paragraph 1 (b),[700] was not shared by the other Commission members. Most members[701] considered it necessary, if not "indispensable"[702] to introduce a provision "in order to forestall ambiguous situations".[703] However, members of the Commission had different opinions regarding how to explain the intended effect of the new paragraph proposed by the United States and the Special Rapporteur. Whereas Waldock's proposal emphasized the consensual basis of the treaty relationship established despite the objection, the provision proposed by the United States seemed to imply that the intended effect originated only from the unilateral act of the objecting State, that is, from the objection, without the reserving State having a real choice. The two positions had their supporters within the Commission.[704]

(9) The text that the Commission finally adopted on a unanimous basis,[705] however, was very neutral and clearly showed that the issue had been left open by the Commission. The Special Rapporteur in fact stated that he was able to "agree with both currents of opinion about the additional paragraph" since "the practical effect of either of the two versions would be much the same and in that particular situation both States would probably be ready to regard the treaty as being in force between them without the reserved provisions".[706]

(10) During the debate at the Vienna Conference on what would become article 21, paragraph 3, almost no problems were raised apart from a few unfortunate changes which the Conference fairly quickly reconsidered.

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[698] *Ibid.*, p. 55, para. 3 (Observations and proposals of the Special Rapporteur on article 21).

[699] *I.C.J. Reports 1951* (see footnote 305 above) p. 27.

[700] *Yearbook ... 1965*, vol. I, 800th meeting, 11 June 1965, p. 172, para. 15.

[701] Mr. Ruda (*ibid.*, para. 13); Mr. Ago (*ibid.*, 814th meeting, 29 June 1965, pp. 271 and 272, paras. 7 and 11); Mr. Tunkin (*ibid.*, p. 271, para. 8) and Mr. Briggs (*ibid.*, p. 272, para. 14).

[702] See the statement made by Mr. Ago (*ibid.*, p. 271, para. 7).

[703] *Ibid.*

[704] Mr. Yasseen (*ibid.*, 800th meeting, 11 June 1965, p. 171, para. 7, p. 172, paras. 21–23 and p. 173, para. 26), Mr. Tunkin (*ibid.*, p. 172, para. 18) and Mr. Pal (*ibid.*, p. 172–173, para. 24) expressed the same doubts as the Special Rapporteur (*ibid.*, p. 173, para. 31); in contrast, Mr. Rosenne, supported by Mr. Ruda (*ibid.*, p. 172, para. 13) considered that "the United States unilateral approach to the situation it had mentioned in its observations concerning paragraph 2 was more in line with the general structure of the Commission's provisions on reservations and preferable to the Special Rapporteur's reciprocal approach" (*ibid.*, para. 10).

[705] *Ibid.*, 816th meeting, 2 July 1965, p. 284.

[706] *Ibid.*, 800th meeting, 11 June 1965, p. 173, para. 31.

(11) The episode is, however, relevant for understanding article 21, paragraph 3. The Conference Drafting Committee, chaired by Yasseen — who, within the Commission, had expressed doubts regarding the difference between the respective effects of acceptance and objection on treaty relations[707] —, proposed an amended text for article 21, paragraph 3, in order to take account of the new presumption in favour of the minimum effect of an objection, which had been adopted following the Soviet amendment. The amended text stated that:

> When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, *the reservation has the effects provided for in paragraphs 1 and 2.*[708]

(12) It would thus have been very clear that a simple objection was assumed to produce the same effect as an acceptance. Although the provision was adopted at one point by the Conference,[709] a joint amendment was submitted by India, Japan, the Netherlands and the USSR[710] a few days before the end of the Conference with a view to replacing the last part of the sentence with the words originally proposed by the Commission, thereby restoring the distinction between the effects of an objection and those of an acceptance.

(13) The joint amendment was incorporated into the text by the Drafting Committee and adopted by the Conference.[711] Yasseen explained that it was "necessary to distinguish between cases where a State objected to a reservation but agreed that the treaty should nevertheless come into force, and cases in which the reservation was accepted".[712]

(14) The reinstatement of the text initially proposed by the Commission restores the true meaning and effects of objections and silences the doctrinal voices that question the distinctive nature of the institution of objections as opposed to acceptances.[713]

(15) Paragraph 3 of article 21 of the 1969 Convention was not, however, an exercise in codification *stricto sensu* at the time of its adoption by the Commission and subsequently by the Conference. It had been included by the Commission "for the sake of completeness",[714] but not as a rule of customary law.[715] Although the Commission had drafted paragraph 3 in something of a hurry and the paragraph had led to debate and proposed amendments right up to the final days of the 1969 Vienna Conference, during the *travaux préparatoires* of the draft that became the 1986 Vienna Convention some members of the Commission nevertheless found the provision to be clear[716] and acceptable.[717] That seems to have been the position of the Commission as a whole, since the paragraph was adopted on first reading in 1977, with only the necessary editorial changes. That endorsement demonstrated the customary nature acquired by paragraph 3 of article 21,[718] which was confirmed by the decision of the Court of Arbitration responsible for settling the dispute in the *Delimitation of the Continental Shelf* case between France and the United

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[707] *Ibid.*, 814th meeting, 29 June 1965, p. 271, para. 5.

[708] *Summary records* (A/CONF.39/11/Add.1), note 339 above, 11th plenary meeting, 30 April 1969, p. 36 (emphasis added).

[709] *Ibid.*, para. 10 (94 votes to none).

[710] A/CONF.39/L.49, *Documents of the Conference* (A/CONF.39/11/Add.2), note 313 above, p. 273.

[711] *Ibid.*, 33rd plenary meeting, 21 May 1969, p. 181, para. 12.

[712] *Ibid.*, para. 2.

[713] See the doctrinal references cited in footnote 660 above.

[714] *Yearbook ... 1966*, vol. II, p. 209, para. (2) of the commentary to draft article 19.

[715] R.W. Edwards, footnote 315 above, p. 398.

[716] Mr. Calle y Calle, *Yearbook ... 1977*, vol. I, 1434th meeting, 6 June 1977, p. 98, para. 8.

[717] Mr. Tabibi, *ibid.*, para. 7.

[718] R.W. Edwards, footnote 315 above, p. 398; G. Gaja, footnote 364 above, p. 308.

Kingdom which was rendered a few days later.[719] The provision is part of the flexible system of reservations to treaties.

(16) What has come to be considered the "normal" effect of an objection to a valid reservation is thus set forth in article 21, paragraph 3, of the Vienna Conventions. This provision, in its fuller 1986 version, provides:

> When a State or an international organization objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State or organization, the provisions to which the reservation relates do not apply as between the reserving State or organization and the objecting State or organization to the extent of the reservation.

(17) Despite the apparent complexity of the wording, the sense of the provision is clear: as soon as the treaty has entered into force in the bilateral relations between the author of the reservation and the author of the objection — a detail that article 21, paragraph 3, does not specify but which is self-evident — the provision or provisions to which the reservation relates shall be excised from their treaty relations to the extent that the reservation so provides. Article 21, paragraph 3, however, calls for three remarks.

(18) *First*, the intended effect of an objection is diametrically opposed to that of an acceptance. Acceptance has the effect of modifying the legal effect of the provisions to which the reservation relates to the extent of the reservation, whereas an objection excludes the application of those provisions to the same extent. Even though in certain specific cases the actual effect on the treaty relationship established despite the objection may be identical to that of an acceptance,[720] the legal regimes of the reservation/acceptance pair and the reservation/objection pair are nevertheless clearly different in law.

(19) *Secondly*, it is surprising — and regrettable — that paragraph 3 does not expressly limit its scope to reservations that are "valid" within the meaning of articles 19 and 23 of the Vienna Conventions, as is the case in paragraph 1.[721] It is nevertheless the case that an objection to an invalid reservation cannot produce the effect specified in paragraph 3,[722] even though this would appear to be permissible in State practice in certain respects. States often object to reservations that they consider to be impermissible as being incompatible with the object and purpose of a treaty without opposing the entry into force of the treaty or indeed expressly state that their objection does not preclude the entry into force of the treaty in their relations with the reserving State.

(20) An example among others is that of the objection of Germany to the reservation formulated by Myanmar to the Convention on the Rights of the Child:

> The Federal Republic of Germany considers that the reservations made by the Union of Myanmar regarding articles 15 and 37 of the Convention on the Rights of the Child are incompatible with the object and purpose of the Convention (art. 51, para. 2) and therefore objects to them.

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[719] *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, decision of 30 June 1977, Reports of International Arbitral Awards, vol. XVIII, p. 130.

[720] On this question, see paragraph (39) below.

[721] "1. A reservation established with regard to another party in accordance with articles 19, 20 and 23 …"; see guideline 4.1 and the commentary thereto above.

[722] See guideline 4.5.1 and the commentary thereto below.

> This objection shall not preclude the entry into force of the Convention as between the Union of Myanmar and the Federal Republic of Germany.[723]

(21) This example is far from isolated. There are numerous objections with "minimum effect" which, in spite of the conviction expressed by their authors as to the impermissibility of the reservation, do not oppose the entry into force of the treaty and say so clearly,[724] while also expressly indicating, at times, that only the provisions to which the reservation relates shall not apply in the relations between the two States.[725] Simple objections to reservations considered to be invalid are thus far from being a matter of mere speculation.[726]

(22) The Vienna Conventions do not resolve this thorny issue and seem to treat the effects of the objection on the content of treaty relations independently from the issue of the validity of reservations. On this point, it can be said that the Conventions went further than necessary in eliminating the link between the criteria for the validity of reservations and the effects of objections. It is one thing to allow States and international organizations to raise an objection to any reservation,[727] whether valid or invalid, and it is quite another to assign identical effects to all these objections. Moreover, as guidelines 4.5.1 and 4.5.2 indicate, article 21, paragraph 3, of the Vienna Conventions does not apply to objections to reservations that do not meet the conditions for validity set out in articles 19 and 23.[728] It is

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[723] *Multilateral Treaties ...*, footnote 341 above, chap. IV.11.

[724] See also, among many examples, the objections of Belgium to the reservations of Egypt and Cambodia to the Vienna Convention on Diplomatic Relations (*ibid.*, chap. III.3) or the objections of Germany to several reservations to the same Convention (*ibid.*). It is, however, interesting to note with regard to Germany's objection, which considers certain reservations to be "incompatible with the letter and spirit of the Convention", that the Government of Germany has stated only for certain objections that they do not preclude the entry into force of the treaty between Germany and the respective States, without expressly taking a position in the other cases where it objected to a reservation for the same reasons. Numerous examples can be found in the objections to the reservations formulated to the International Covenant on Civil and Political Rights: in particular the objections raised to the reservation of the United States of America to article 6 of the Covenant by Belgium, Denmark, Finland, France, Italy, the Netherlands, Norway, Portugal, Spain and Sweden (*ibid.*). All those States considered the reservation to be incompatible with the object and purpose of the Covenant, but nonetheless did not oppose the entry into force of the Covenant in their relations with the United States, unlike Germany, which did not stay silent on that point even though its objection was also motivated by the incompatibility of the United States reservation "with the text as well as the object and purpose of article 6" (*ibid.*). Nor is the phenomenon limited to human rights treaties: see also the objections of Austria, France, Germany and Italy to the reservation of Viet Nam to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (*ibid.*, chap. VI.19).

[725] See, for example, the objection by Belgium to the reservations of several States to the Vienna Convention on Diplomatic Relations: "The Government of the Kingdom of Belgium objects to the reservations made with respect to article 27, paragraph 3, by Bahrain and with respect to article 37, paragraph 2, by the United Arab Republic (now the Arab Republic of Egypt), Cambodia (now the Khmer Republic) and Morocco. The Government nevertheless considers that the Convention remains in force as between it and the aforementioned States, respectively, except in respect of the provisions which in each case are the subject of the said reservations" (*Multilateral Treaties Deposited with the Secretary-General* (http://treaties.un.org), chap. III.3; see also the objection of the Netherlands to the reservation formulated by the United States to the International Covenant on Civil and Political Rights, cited in paragraph (4) of the commentary to guideline 4.3.1).

[726] K. Zemanek, footnote 364 above, p. 331.

[727] See the commentary to guideline 2.6.3, paragraphs (1) to (9).

[728] See in particular G. Gaja, "*Il regime della Convenzione di Vienna concernente le riserve inammissibili*", in *Studi in onore di Vincenzo Starace* (Naples, Ed. Scientifica, 2008), pp. 349–361.

for this reason that each of the first three paragraphs of guideline 4.3.5 make it clear that they apply only to objections to valid reservations.

(23) *Thirdly*, although it is clear from article 21, paragraph 3, of the Vienna Conventions that the provisions to which the reservation relates[729] do not apply *vis-à-vis* the author of the objection, the phrase "to the extent of the reservation" leaves one "rather puzzled"[730] and requires further clarification.

(24) The decision of the Court of Arbitration in the *Delimitation of the Continental Shelf* case between the United Kingdom and France[731] clarifies the meaning to be given to this phrase. France had, at the time of ratification, formulated a reservation to article 6 of the 1958 Geneva Convention on the Continental Shelf, the relevant portion of which reads as follows:

> The Government of the French Republic will not accept that any boundary of the continental shelf determined by application of the principle of equidistance shall be invoked against it:
>
> - If such boundary is calculated from baselines established after 29 April 1958
> - If it extends beyond the 200-metre isobath
> - If it lies in areas where, in the Government's opinion, there are "'special circumstances'" within the meaning of article 6, paragraphs 1 and 2, that is to say: the Bay of Biscay, the Bay of Granville, and the sea areas of the Straits of Dover and of the North Sea off the French coast[732]

The Government of the United Kingdom objected to this part of the French reservation, stating only that:

> The Government of the United Kingdom are unable to accept the reservations made by the Government of the French Republic.[733]

(25) Before the Court of Arbitration, France maintained that on account of the combined effect of its reservation and the objection by the United Kingdom, and in accordance with the principle of mutuality of consent, article 6 as a whole was not applicable in relations between the two parties.[734] The United Kingdom took the view that, in accordance with article 21, paragraph 3, of the Vienna Convention — which had at the time not entered into force and had not even been signed by France — "the French reservations cannot render article 6 inapplicable *in toto*, but at the most 'to the extent of the reservation'".[735]

(26) The Court found that:

> The answer to the question of the legal effect of the French reservations lies partly in the contentions of the French Republic and partly in those of the United Kingdom. Clearly, the French Republic is correct in stating that the establishment of treaty

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[729] The term "provisions" should not be interpreted too narrowly here. It may refer to an article or several articles of the treaty, or simply to a paragraph, a sentence or a phrase, or even to the treaty as a whole viewed from a particular perspective.

[730] As the representative of the United States of America expressed it at the Vienna Conference, *Summary Records* (A/CONF.39/11/Add.1), see note 339 above, 33rd plenary meeting, 21 May 1969, p. 181, para. 9.

[731] See note 719 above.

[732] *Multilateral Treaties* ..., footnote 341 above, chap. XXI.4.

[733] *Ibid.*

[734] See note 719 above, p. 40, para. 57.

[735] *Ibid.*, p. 41, para. 58.

> relations between itself and the United Kingdom under the Convention depended on the consent of each State to be mutually bound by its provisions; and that when it formulated its reservations to article 6 it made its consent to be bound by the provisions of that article subject to the conditions embodied in the reservations. There is, on the other hand, much force in the United Kingdom's observation that its rejection was directed to the reservations alone and not to article 6 as a whole. In short, the disagreement between the two countries was not one regarding the recognition of article 6 as applicable in their mutual relations but one regarding the matters reserved by the French Republic from the application of article 6. The effect of the United Kingdom's rejection of the reservations is thus limited to the reservations themselves.[736]

The Court went on to say:

> However, the effect of the rejection may properly, in the view of the Court, be said to render the reservations non-opposable to the United Kingdom. Just as the effect of the French reservations is to prevent the United Kingdom from invoking the provisions of article 6 except on the basis of the conditions stated in the reservations, so the effect of their rejection is to prevent the French Republic from imposing the reservations on the United Kingdom for the purpose of invoking against it as binding a delimitation made on the basis of the conditions contained in the reservations. Thus, the combined effect of the French reservations and their rejection by the United Kingdom is neither to render article 6 inapplicable *in toto*, as the French Republic contends, nor to render it applicable *in toto*, as the United Kingdom primarily contends. It is to render the article inapplicable as between the two countries to the extent, but only to the extent, of the reservations; and this is precisely the effect envisaged in such cases by article 21, paragraph 3 of the Vienna Convention on the Law of Treaties and the effect indicated by the principle of mutuality of consent.[737]

(27) This 1977 decision not only confirms the customary nature of article 21, paragraph 3,[738] but also shows that the objective of this provision — which derives from the same principle of mutuality of consent — is to safeguard as much as possible the agreement between the parties. One should not exclude the application of the entirety of the provision or provisions to which a reservation relates, but only of the parts of those provisions concerning which the parties have expressed disagreement.

(28) In the case of France and the United Kingdom, that meant accepting that article 6 remained applicable as between the parties apart from the matters covered by the French reservation. This is what should be understood by "to the extent of the reservation". The effect sought by paragraph 3 is to preserve the agreement between the parties to the extent possible by reducing the application of the treaty to the provisions on which there is agreement and excluding the others, or, as Jean Kyongun Koh explains:

> Here the Vienna Convention seems to be overtly seeking to preserve as much of the treaty as possible even when parties disagree about a reservation. ... The Vienna Convention tries to salvage as much as is uncontroversial about the relations between reserving and opposing States.[739]

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[736] *Ibid.*, para. 59.

[737] *Ibid.*, p. 42, para. 61.

[738] See paragraph (16) above.

[739] *Op. cit.*, footnote 499 above, p. 102.

(29) Although the principle of article 21, paragraph 3, is clearer than is sometimes suggested, it is still difficult to apply, as noted by Bowett:

> The practical difficulty may be that of determining precisely what part of the treaty is affected by the reservation and must therefore be omitted from the agreement between the two Parties. It may be a whole article, or a subparagraph of an article, or merely a phrase or word within the subparagraph. There can be no rule to determine this, other than the rule that by normal methods of interpretation and construction one must determine which are the "provisions", the words, to which the reservation relates.[740]

(30) Moreover, as Horn rightfully notes:

> A reservation does not only affect the provision to which it directly refers but may have repercussions on other provisions. An "exclusion" of a provision, that is the introduction of an opposite norm, changes the context that is relevant for interpreting other norms. A norm seldom exists in isolation but forms an integrated part in a system of norms. The extent of a reservation does not necessarily comprise only the provision directly affected but also those provisions the application of which is influenced by the "exclusion" or the "modification".[741]

(31) Only an interpretation of the reservation can thus help in determining the provisions of the treaty, or the parts of these provisions, whose legal effect the reserving State or international organization purports to exclude or modify. Those provisions or parts or provisions are, by virtue of an objection, not applicable in treaty relations between the author of the objection and the author of the reservation. All the provisions or parts of provisions not affected by the reservation remain applicable as between the parties.

(32) In principle, what should be excluded from relations between the two parties can be determined by asking what the reservation actually modifies in the treaty relations of its author *vis-à-vis* a contracting party that has accepted it.

(33) However, paragraph 1 of guideline 4.3.5 demands more precise information, depending on whether the reservation that is the subject of the objection purports to exclude or modify the legal effect of certain provisions of the treaty. It is precisely this information that is provided in paragraphs 2 and 3 of the guideline.

(34) In order to clarify the content of the treaty relations between the author of the reservation and the objecting State or international organization, it is useful to recall the distinction between "modifying reservations" and "excluding reservations" employed in guideline 4.2.4 — the pattern of which guideline 4.3.5 generally follows — to determine the effects of an established reservation.

(35) Like paragraphs 2 and 3 of guideline 4.2.4, paragraphs 2 and 3 of guideline 4.3.5 begin with the phrase "to the extent that", to reflect the fact that a single reservation can have both excluding and modifying effects.[742] The words "purports to exclude" or "purports to modify", which are the very words used in article 2, paragraph 1 (d), of the Vienna Conventions and are reproduced in guidelines 1.1 and 1.1.1 of the Guide to Practice in order to define reservations, contrast with the verbs "exclude" and "modify", which appear in the corresponding provisions of guideline 4.2.4 to indicate that the reservations referred to in guideline 4.3.5 cannot be considered to be "established" in respect of the author of the objection since, *ex hypothesi*, the latter has not accepted them.

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[740] D.W. Bowett, footnote 363 above, p. 86.

[741] F. Horn, footnote 321 above, p. 178.

[742] See paragraph (3) of the commentary to guideline 4.2.4.

(36) In the case of excluding reservations, the situation is particularly straightforward. The Egyptian reservation to the 1961 Vienna Convention on Diplomatic Relations[743] is a case in point. That reservations reads: "Paragraph 2 of article 37 shall not apply".[744] The provision to which the reservation relates is clearly article 37, paragraph 2, of the Vienna Convention on Diplomatic Relations. In treaty relations between the author of the reservation and the author of a simple objection, therefore, the Vienna Convention on Diplomatic Relations will apply without paragraph 2 of article 37. This provision does not apply, to the extent provided by the reservation: in other words, it does not apply at all. Its application is entirely excluded.

(37) Cuba made a reservation purporting to exclude the application of article 25, paragraph 1, of the Convention on Special Missions:

> The Revolutionary Government of the Republic of Cuba enters an express reservation with regard to the third sentence of paragraph 1 of article 25 of the Convention, and consequently does not accept the assumption of consent to enter the premises of the special mission for any of the reasons mentioned in that paragraph or for any other reasons.[745]

In this case, too, a (simple) objection results in the exclusion of the application of the third sentence of paragraph 1 of article 25 of the Convention. The rest of the provision, however, remains in force between the two parties.

(38) Some types of excluding reservations are more complex, however. This is the case, for instance, with across-the-board reservations, that is, reservations that purport to exclude the legal effect of the treaty as a whole with respect to certain specific aspects.[746] The reservation of Guatemala to the Customs Convention on the Temporary Importation of Private Road Vehicles of 1954 thus states:

> The Government of Guatemala reserves its right:
>
> (1) To consider that the provisions of the Convention apply only to natural persons, and not to legal persons and bodies corporate as provided in chapter 1, article 1.[747]

A purely mechanical application of article 21, paragraph 3, of the Vienna Conventions might suggest that the treaty relation established between the author of this reservation and an objecting State excludes the application of article 1 – the provision to which the reservation refers. But the fact that only article 1 is expressly referred to does not mean that the reservation applies only to that provision. In the specific example of Guatemala's reservation, it would be equally absurd to exclude only the application of article 1 of the Convention or to conclude that, because the reservation concerns all the provisions of the Convention (by excluding part of its scope of application *ratione personae*), a simple objection excludes all the provisions of the Convention. Only that which is effectively modified or excluded as a result of the reservation remains inapplicable in the treaty relations between the author of the reservation and the author of the simple objection: the application of the Convention as a whole to the extent that such application concerns legal persons.

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[743] United Nations, *Treaty Series*, vol. 500, p. 95.

[744] *Multilateral Treaties* ..., footnote 341 above, chap. III.3.

[745] *Ibid.*, chap. III.9.

[746] See guideline 1.1.1 (Object of reservations) and the commentary thereto (*Yearbook ... 1999*, vol. II, Part Two, pp. 93–95).

[747] *Multilateral Treaties* ..., footnote 341 above, chap. XI.A.8.

(39) In such cases, but only in such cases,[748] an objection produces in concrete terms the same effects as an acceptance: the exclusion of the legal effect, or application, of the provision to which the reservation relates "to the extent of the reservation"; an acceptance and a simple objection therefore result in the same treaty relations between the author of the reservation, on the one hand, and the author of the acceptance or of the simple objection, on the other. The literature agrees on this point.[749] The similarity in the effects of an acceptance and a minimum-effect objection does not mean, however, that the two reactions are identical and that the author of the reservation "would get what it desired".[750] Moreover, while an acceptance is tantamount to agreement, or at least to the absence of opposition to a reservation, an objection cannot be considered mere "wishful thinking";[751] it expresses disagreement and purports to protect the rights of its author much as a unilateral declaration (protest) does.[752]

(40) In the light of these observations, it would seem useful to clarify the concrete effect of an objection to an excluding reservation by recognizing, in paragraph 2 of guideline 4.3.5, the similarity between the treaty relations established in the two cases.

(41) However, in the case of modifying reservations, which are the subject of paragraph 3 of guideline 4.3.5, the difference between an objection and an acceptance is very clear. Whereas the establishment of such a reservation modifies the legal obligations between the author of the reservation and the contracting parties in respect of which the reservation is established, article 21, paragraph 3, excludes the application of all the provisions that potentially would be modified by the reservation, to the extent provided by the reservation. If a State makes a reservation that purports to replace one treaty obligation with another, article 21, paragraph 3, requires that the obligation potentially replaced by the reservation shall be excised from the treaty relations between the author of the reservation and the author of the simple objection. Neither the initial obligation, nor the modified obligation proposed by the reservation, applies: the former because the author of the reservation has not agreed to it and the latter because the author of the objection has in turn opposed it.

(42) Paragraph 3 of guideline 4.3.5 highlights this difference between a reservation with a modifying effect that has been accepted and a reservation that is the subject of a simple objection. As is the case with paragraph 2, paragraph 3 must be read in conjunction with paragraph 1 of the guideline, which it is intended to clarify.

(43) Paragraph 4, which is the final paragraph of the guideline, sets out a common-sense rule that can be deduced *a contrario* from the three preceding paragraphs, namely that the interaction of a reservation and an objection leaves intact all the rights and obligations arising under the provisions of the treaty, apart from those that are the subject of the reservation. Yet this principle must be understood as being subject to the special case of

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[748] The same does not hold true for objections to modifying reservations – see guideline 4.3.5, paragraph 3.

[749] See for example Belinda Clark, "The Vienna Convention Reservations Regime and the Convention on Discrimination against Women", *A.J.I.L.* 1991, vol. 85, No. 2, p. 308; M. Coccia, footnote 315 above, p. 36; G. Gaja, footnote 364 above, p. 327; P.-H. Imbert, footnote 522 above, p. 157; J.-M. Ruda, footnote 660 above, p. 199; Sir Ian Sinclair, footnote 499 above, p. 76. See also the explanations of the representative of the Netherlands in respect of the four-State amendment, *Summary records* (A/CONF.39/11/Add.1), cited in footnote 686 above, 32nd plenary meeting, 20 May 1969, p. 179, para. 55; F. Horn, footnote 321 above, p. 173; J. Klabbers, footnote 660 above, pp. 186–187.

[750] Jan Klabbers, footnote 660 above, p. 179.

[751] P.-H. Imbert, footnote 522 above, p. 157 quoting Jacques Dehaussy.

[752] Karl Zemanek, footnote 364 above, p. 332.

what are sometimes called declarations "with intermediate effect", which are the subject of guideline 4.3.6.

4.3.6 Effect of an objection on provisions other than those to which the reservation relates

1. A provision of the treaty to which the reservation does not relate, but which has a sufficient link with the provisions to which the reservation does relate, is not applicable in the treaty relations between the author of the reservation and the author of an objection formulated in accordance with guideline 3.4.2.

2. The reserving State or organization may, within a period of 12 months following the notification of such an objection, oppose the entry into force of the treaty between itself and the objecting State or organization. In the absence of such opposition, the treaty shall apply between the author of the reservation and the author of the objection to the extent provided by the reservation and the objection.

Commentary

(1) According to guideline 3.4.2 (Permissibility of an objection to a reservation),

> An objection to a reservation by which a State or an international organization purports to exclude in its relations with the author of the reservation the application of provisions of the treaty to which the reservation does not relate is only permissible if:
>
> 1. The additional provisions thus excluded have a sufficient link with the provisions to which the reservation relates; and
>
> 2. The objection would not defeat the object and purpose of the treaty in the relations between the author of the reservation and the author of the objection.

(2) Such objections, while they do not go so far as to preclude the entry into force of the treaty as a whole as between the author of the objection and the author of the reservation (objections with maximum effect[753]), are nevertheless intended to produce effects that go further than the situation covered by article 21, paragraph 3, of the Vienna Conventions, which is reproduced and amplified in guideline 4.3.5; such objections are often referred to as objections "with intermediate effect".[754]

(3) The object of guideline 4.3.6 is not to set out the conditions for the permissibility of such reservations — that is the purpose of guideline 3.4.2 — but to determine what effects they may produce. To what extent can the author of an objection extend the effect of the objection between a "simple" effect (article 21, paragraph 3, of the Vienna Conventions) and a "qualified" or "maximum" effect, which excludes the entry into force of the treaty as a whole in the relations between the author of the reservation and the author of the objection (article 20, paragraph 4 (b), of the Vienna Conventions)?

(4) Clearly, the choice cannot be left entirely to the discretion of the author of the objection.[755] As the International Court of Justice emphasized in its 1951 opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*:

> It must clearly be assumed that the contracting States are desirous of preserving intact at least what is essential to the object of the Convention; should

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[753] See guideline 4.3.4.

[754] See paragraph (1) of the commentary to guideline 3.4.2.

[755] See paragraph (8) of the commentary to guideline 3.4.2 above.

> this desire be absent, it is quite clear that the Convention itself would be impaired both in its principle and in its application.[756]

(5) Thus an objection cannot under any circumstances exclude from the treaty relations between the objecting State or international organization and the author of the reservation provisions of the treaty that are essential for the realization of its object and purpose. This clearly constitutes a limit not to be exceeded, and draft guideline 3.4.2 even makes it a criterion for the assessment of permissibility.[757]

(6) On the other hand, it is important not to lose sight of the principle of mutual consent, which is the basis for the law of treaties as a whole and which, as the Court of Arbitration rightly stressed in the Anglo-French *Delimitation of the Continental Shelf* case,[758] is essential for determining the effects of an objection and of a reservation. As has been recalled many times during the Commission's work on reservations to treaties: "No State can be bound by contractual obligations it does not consider suitable."[759] This is true for both the reserving State (or international organization) and the objecting State (or international organization). However, in some situations, the effects attributed to objections by article 21, paragraph 3, of the Vienna Conventions may prove unsuited for the re-establishment of mutual consent between the author of the reservation and the author of the objection, even where the object and purpose of the treaty are not threatened by the reservation.

(7) This is the case, for example, when the reservation purports to exclude or modify a provision of the treaty which, according to the intention of the parties, is necessary to safeguard the balance between the rights and obligations resulting from their consent to the entry into force of the treaty. This applies when the reservation not only undermines the consent of the parties to the provision to which the reservation directly refers, but also upsets the balance achieved during negotiations on a set of interrelated provisions. A contracting party may then legitimately consider that being bound by one of the provisions in question without being able to benefit from one or more of the others constitutes "a contractual obligation it does not consider suitable".

(8) These are the types of situations that objections with intermediate effect are meant to address. The practice has been resorted to mainly, if not exclusively, in the case of reservations and objections to the provisions of Part V of the 1969 Vienna Convention, and this example makes it clear why authors of objections seek to expand the effects they intend their objections to produce.

(9) Article 66 of the Vienna Convention and the annex thereto relating to compulsory conciliation provide procedural guarantees which many States, at the time the Convention was adopted, considered essential in order to prevent abuse of certain provisions of Part V.[760] The reaction of several States to reservations to article 66 of the 1969 Vienna Convention was aimed at safeguarding the package deal, which some States had sought to undermine through reservations and which could only be restored through an objection that

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[756] *I.C.J. Reports 1951*, p. 27.

[757] See paragraph (1) above.

[758] Decision of 30 June 1977, cited in note 719 above, p. 42, para. 61.

[759] C. Tomuschat, footnote 321 above, p. 466; see also the second report on reservations to treaties (A/CN.4/477/Add.1), *Yearbook ... 1996*, vol. II, Part One, p. 57, paras. 97 and 99; and D. Müller's commentary on article 20 (1969) in Olivier Corten and Pierre Klein (eds.), footnote 324 above, pp. 809–811, paras. 20–24.

[760] See paragraphs (9) and (10) of the commentary to guideline 3.4.2.

went beyond the "normal" effects of the reservations envisaged by the Vienna Conventions.[761]

(10) Hence in order to restore what could be referred to as the "consensual balance" between the author of the reservation and the author of the objection, the effect of the objection on treaty relations between the two parties should be allowed to extend to provisions of the treaty that have a specific link with the provisions to which the reservation refers.

(11) It was in the light of these remarks that the Commission included in the Guide to Practice paragraph 1 of guideline 4.3.6, specifying that an objection may exclude the application of provisions to which the reservation does not refer under the terms of guideline 3.4.2. This is mentioned expressly so that there can be no doubt whatsoever that this type of effect can only be produced if the conditions for the validity of reservations with intermediate effect set out in this guideline are met. To the extent possible, the wording of paragraph 1 of guideline 4.3.6 has been aligned with that of guideline 3.4.2.[762]

(12) While conceding that objections with intermediate effect could produce the effects intended by their authors under the strict conditions set out in guideline 3.4.2, the Commission is aware of the risks they may pose for the overall treaty balance, and it believes that they should continue to constitute exceptions.

(13) Paragraph 2 of guideline 4.3.6 partially addresses this concern and seeks to maintain the principle of mutual consent to the greatest extent possible. This paragraph proceeds from the principle that objections with intermediate effect constitute in some respects "counter-reservations"[763] and provide the author of the reservation with an opportunity to prevent such an effect from being produced by opposing the entry into force of the treaty between itself and the author of the objection.

(14) It seemed reasonable, as a step of progressive development, to set a time period of 12 months for the formulation of such objections, by analogy with the time period available to contracting States and contracting organizations for the expression of their intention not to be bound by the treaty in respect of the author of the reservation.[764]

(15) The second sentence of paragraph 2 of guideline 4.3.6 draws the consequence of the absence of such opposition within the stipulated time period by transposing the rule applicable to objections with "minimum" effect established in article 21, paragraph 3, of the Vienna Conventions and reproduced in guideline 4.3. The phrase "to the extent provided by the reservation and the objection" is a succinct way of saying that if all these conditions are met, the treaty shall apply as between the author of the reservation and the author of the objection with the exception of those provisions excluded or modified by the reservation and those additional provisions excluded by the objection.

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[761] D. Müller, "Article 21 (1969)", in Olivier Corten and Pierre Klein (eds.), footnote 396 above, pp. 927 and 928, para. 70.

[762] Some members of the Commission regretted this alignment, particularly the repetition of the term "sufficient link", which they felt was unduly cautious; they would have preferred "close link" or even "inextricable link".

[763] See paragraph (7) of the commentary to guideline 3.4.2.

[764] See article 20, paragraph 5, of the Vienna Conventions and also guideline 2.6.13.

4.3.7 Right of the author of a valid reservation not to be compelled to comply with the treaty without the benefit of its reservation

The author of a reservation which is permissible and which has been formulated in accordance with the required form and procedures cannot be compelled to comply with the provisions of the treaty without the benefit of its reservation.

Commentary

(1) The much more controversial question of objections with "super-maximum" effect whereby the author of the objection affirms that the treaty enters into force in relations between it and author of the reservation without the latter being able to benefit from its reservation,[765] can also be resolved logically by applying the principle of mutual consent.[766]

(2) It should be noted, however, that the practice of objections with super-maximum effect has developed not within the context of objections to valid reservations, but in reaction to reservations that are incompatible with the object and purpose of a treaty. A recent example is afforded by the Swedish objection to the reservation made by El Salvador to the 2006 Convention on the Rights of Persons with Disabilities:

> [T]he Government of Sweden has examined the reservation made by the Government of the Republic of El Salvador upon ratifying the Convention on the Rights of Persons with Disabilities.
>
> According to international customary law, as codified in the Vienna Convention on the Law of Treaties, reservations incompatible with the object and purpose of a treaty shall not be permitted. It is in the common interest of all States that treaties to which they have chosen to become parties, are respected as to their object and purpose by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.
>
> The Government of Sweden notes that El Salvador in its reservation gives precedence to its Constitution over the Convention. The Government of Sweden is of the view that such a reservation, which does not clearly specify the extent of the derogation, raises serious doubt as to the commitment of El Salvador to the object and purpose of the Convention.
>
> The Government of Sweden therefore objects to the aforesaid reservation made by the Government of the Republic of El Salvador to the Convention on the Rights of Persons with Disabilities and considers the reservation null and void. This objection shall not preclude the entry into force of the Convention between El Salvador and Sweden. The Convention enters into force in its entirety between El Salvador and Sweden, without El Salvador benefiting from its reservation.[767]

(3) Regardless of the consequences of such an objection with super-maximum effect in the case of an invalid reservation,[768] it is clear that such an effect of an objection is not only not provided for in the Vienna Conventions — which is also true of an objection with intermediate effect — but is also clearly incompatible with the principle of mutual consent. Accordingly, super-maximum effect is excluded in the case of a valid reservation: the author of an objection cannot force the author of the reservation to be bound by more than what it is prepared to accept. The objecting State or international organization cannot

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[765] See paragraph (17) of the commentary to guideline 3.4.2.

[766] See paragraph (5) of the commentary to guideline 4.3.6 above.

[767] C.N.84.2009.TREATIES-4, available from http://treaties.un.org (Depositary Notification).

[768] See guidelines 4.5.2 [4.5.3] and 4.5.3 [4.5.4].

impose on a reserving State or international organization that has validly exercised its right to formulate a reservation any obligations which the latter has not expressly agreed to assume. This is the question addressed in guideline 4.3.7.

(4) The author of a reservation that meets the criteria for permissibility and has been formulated in accordance with the prescribed form and procedure cannot be bound to comply with the provisions of the treaty without the benefit of its reservation.

(5) This does not mean, however, that an objection with super-maximum effect has no effect on the content of treaty relations between its author and the author of the reservation. As is the case with reservations with intermediate effect that go beyond admissible effects, such unilateral declarations are objections through which the author expresses its disagreement with the reservation. The application of the rules set out in guideline 4.3.5 is not limited to simple objections. Those rules apply to all objections to a valid reservation, including objections with super-maximum effect.

4.4 Effect of a reservation on rights and obligations outside of the treaty

4.4.1 Absence of effect on rights and obligations under another treaty

A reservation, acceptance of it or objection to it neither modifies nor excludes the respective rights and obligations of their authors under another treaty to which they are parties.

Commentary

(1) The definition of a reservation contained in article 2, paragraph 1 (d), of the Vienna Conventions and reproduced in guideline 1.1 of the Guide to Practice clearly establishes that a reservation "purports to exclude or to modify the legal effect of certain provisions *of the treaty*". Likewise, article 21, paragraph 1, provides that an established reservation can only modify (or exclude) the "provisions *of the treaty* to which the reservation relates".[769] Although article 21, paragraph 3, and guideline 4.2.4 are not as precise on this point, they refer to the "provisions to which the reservation relates", which, based on the definition of a reservation, can only mean "certain provisions *of the treaty*".

(2) The text of the Vienna Conventions therefore leaves no room for doubt: a reservation can only modify or exclude the legal effects *of the treaty* or some of its provisions. A reservation remains a unilateral statement linked to a treaty, the legal effects of which it purports to modify. It does not constitute a unilateral, independent act capable of modifying the obligations, still less the rights, of its author. Furthermore, the combined effect of a reservation and an objection cannot exclude the application of norms external to the treaty.

(3) Although technically they do not apply to a reservation to a treaty, the arguments put forward by France on its reservation to its declaration of acceptance of the jurisdiction of the International Court of Justice under article 36, paragraph 2, of the Statute of the Court in the *Nuclear Tests* cases are quite instructive in this regard.[770] In order to establish that the Court had no jurisdiction in those cases, France contended that the reservation generally

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[769] On the differences between article 2, paragraph 1 (d), and article 21, paragraph 1, of the Vienna Conventions, see Daniel Müller, "Article 21 (1969)", footnote 396 above, pp. 896–898, paras. 25 and 26.

[770] *Nuclear Tests (Australia v. France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, pp. 101 and 102. para. 18; *Nuclear Tests (New Zealand v. France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, pp. 137 and 138, para. 16.

limited its consent to the jurisdiction of the Court, particularly the consent given in the General Act of 1928. In their joint dissenting opinion, several judges of the Court rejected the French thesis:

> "Thus, in principle, a reservation relates exclusively to a State's expression of consent to be bound by a particular treaty or instrument and to the obligations assumed by that expression of consent. Consequently, the notion that a reservation attached to one international agreement, by some unspecified process, is to be superimposed upon, or transferred to another international instrument is alien to the very concept of a reservation in international law; and also cuts across the rules governing the notification, acceptance and rejection of reservations."[771]

(4) This opinion is expressed in sufficiently broad terms not to be applicable exclusively to the specific situation of reservations to declarations of acceptance of the compulsory jurisdiction of the Court under the optional clause but, more generally, to any reservation to an international treaty. This approach was later endorsed by the Court itself in the *Border and Transborder Armed Actions (Nicaragua v. Honduras)* case, in which Honduras sought to have its reservation to its declaration of acceptance of the compulsory jurisdiction of the Court under the optional clause take precedence over its obligations by virtue of article XXXI of the Pact of Bogotá. The Court, however, held that such a reservation could not in any event restrict the commitment which Honduras had undertaken by virtue of article XXXI. The Honduran argument as to the effect of the reservation to its 1986 declaration on its commitment under article XXXI of the Pact could not therefore be accepted.[772]

(5) This relative effect of the reservation and of reactions to the reservation, in the sense that they can modify or exclude only the legal effects of the treaty in regard to which they were formulated and made, results from the principle *pacta sunt servanda*. A State or international organization cannot release itself through a reservation, acceptance of a reservation or objection to a reservation from obligations it has elsewhere.

(6) Draft guideline 4.4.1 highlights the absence of effect of a reservation, or acceptance of or objection to it, on treaty obligations under another treaty. Only the legal effects of treaty provisions to which the reservation relates can be modified or excluded.

(7) The strong wording employed in this guideline does not exclude the possibility that a reservation to a particular treaty as well as the reactions to it may come to play a certain role in the interpretation of other treaties by analogy or by means of *a contrario* reasoning. However, notwithstanding some views to the contrary, the Commission felt that such considerations lay outside the scope of guideline 4.4.1, which merely recalls that such instruments can neither *modify* nor *exclude* the rights and obligations emanating from another treaty: even if the reservations, acceptances or objections of which they are the object can play a role in interpretation, they cannot have modifying or excluding effects.

4.4.2 Absence of effect on rights and obligations under customary international law

A reservation to a treaty provision which reflects a rule of customary international law does not of itself affect the rights and obligations under that rule, which shall continue to apply as such between the reserving State or organization and other States or international organizations which are bound by that rule.

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[771] *Nuclear Tests (Australia v. France)*, Joint dissenting opinion of Justices Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock, *I.C.J. Reports 1974*, p. 350, para. 83.

[772] *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 88, para. 41.

Commentary

(1) Just as a reservation cannot influence pre-existing treaty relations of its author, it cannot have an impact on other obligations, of any nature, binding on the author of the reservation apart from the treaty. This is especially clear with regard to a reservation to a provision reflecting[773] a rule of customary international law.[774] Certainly, as between the author of the reservation and the contracting parties with regard to which the reservation is established, the reservation has the "normal" effect provided for in article 21, paragraph 1, creating between those parties a specific regulatory system which may derogate from the customary norm concerned in the context of the treaty[775] – for example, by imposing less stringent obligations. Nevertheless, the reservation in no way affects of itself the obligatory nature of the customary rule as such. It cannot release its author from compliance with the customary rule, if it is in effect with regard to the author, outside these specific regulatory systems.[776] The International Court of Justice has clearly stressed in this regard that:

> no reservation could release the reserving party from obligations of general maritime law existing outside and independently of the Convention.[777]

The reason for this is simple:

> The fact that the above-mentioned principles [of customary and general international law], recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions.[778]

(2) Modifying or excluding the application of a treaty provision that reflects a customary rule can indeed produce effects within the framework of treaty relations; however, it does not in any way affect the existence or obligatory nature of the customary rule *per se*.

(3) Concretely, the effect of the reservation (and of the reactions to it – acceptance or objection) is to exclude application of the *treaty* rule that reflects a customary rule, which means that the author of the reservation is not bound *vis-à-vis* the other contracting parties to comply with the (treaty) rule within the framework of the treaty. For example, it is not required to have recourse to arbitration or an international court for any matter of interpretation or application of the rule, despite a dispute settlement clause contained in the treaty. Nevertheless, since the customary rule retains its full legal force, the author of the reservation is not free, by virtue of the reservation, to violate the customary rule (which is

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[773] On the use of the word "reflect", see *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), p. 89, paragraph (1) of the commentary to guideline 3.1.8.

[774] On the question of the admissibility of such reservations, see guideline 3.1.8, paragraph 1 (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), p. 88). See also Gérard Teboul, "*Remarques sur les réserves aux conventions de codification*", *R.G.D.I.P.*, 1982, pp. 679–717.

[775] *Ibid.*, p. 708, para. 32.

[776] Prosper Weil has stated that "the will demonstrated by a State in regard to a particular convention is now of little significance … whether or not it makes reservations to some of its clauses … it will in any case be bound by those provisions of the convention which have been recognized as having the character of rules of customary or general international law" ("*Vers une normativité relative en droit international?*", *R.G.D.I.P.*, 1982, pp. 43 and 44).

[777] *North Sea Continental Shelf Cases, Judgment, I.C.J. Reports 1969*, p. 40, para. 65.

[778] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction of the Court and Admissibility of the Application, Judgment of 26 November 1984, I.C.J Reports 1984*, p. 424, para. 73.

by definition identical); it must comply with it as such. Compliance or the consequences of non-compliance with the customary rule are not, however, part of the legal regime created by the treaty but are covered by general international law and evolve along with it.

(4) This approach, moreover, is shared by States, which do not hesitate to draw the attention of the author of a reservation to the fact that the customary rule remains in force in their mutual relations, their objection notwithstanding. See, for example, the Netherlands in its objection to several reservations to article 11, paragraph 1, of the Vienna Convention on Diplomatic Relations:

> The Kingdom of the Netherlands does not accept the declarations by the People's Republic of Bulgaria, the German Democratic Republic, the Mongolian People's Republic, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics, the Byelorussian Soviet Socialist Republic and the People's Democratic Republic of Yemen concerning article 11, paragraph 1, of the Convention. The Kingdom of the Netherlands takes the view that this provision remains in force in relations between it and the said States in accordance with international customary law.[779]

(5) The Commission has already adopted a guideline on this matter in the framework of the third part of the Guide to Practice on the validity of reservations. The guideline in question is 3.1.8, which reads as follows:

> 3.1.8 Reservations to a provision reflecting a customary norm
>
> 1. The fact that a treaty provision reflects a customary norm is a pertinent factor in assessing the validity of a reservation although it does not in itself constitute an obstacle to the formulation of the reservation to that provision.
>
> 2. A reservation to a treaty provision which reflects a customary norm does not affect the binding nature of that customary norm which shall continue to apply as such between the reserving State or international organization and other States or international organizations which are bound by that norm.[780]

(6) It is the view of the Commission that paragraph 2 of guideline 3.1.8 addresses this question satisfactorily. However, this paragraph has more to do with the effects of a reservation than with its validity. Accordingly, it seems sensible to turn paragraph 2 of guideline 3.1.8 into a new draft guideline 4.4.2.[781]

(7) In making this transposition, however, the Commission decided to modify the text of guideline 3.1.8, paragraph 2, somewhat.

(8) The principal modification involved inserting the words "of itself" between the words "does not" and the phrase "affect the rights and obligations under" the rule of customary international law reflected in the treaty provision to which the objection is made. The Commission in fact considered that while a reservation could not have any immediate or direct effect on the customary rights and obligations concerned, it could nevertheless influence the evolution or disappearance of the customary rule in question owing to the expression of *opinio juris*.

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[779] *Multilateral Treaties* ..., footnote 341 above, chap. III.3. In essence, the validity of the remark by the Netherlands is not in doubt; however, the way it is framed is highly debatable: it is not the treaty *provision* that remains in force between the reserving States and the Netherlands, but the customary norm that the provision reflects.

[780] *General Assembly Official Records, Sixty-second Session, Supplement No. 10* (A/62/10), p. 88.

[781] It goes without saying that guideline 3.1.8 will now consist solely of existing paragraph 1.

(9) The other changes made to the text of guideline 3.1.8, paragraph 2, were as follows:

- It seemed appropriate to replace the phrase "does not affect the binding nature of that customary norm" with "does not … affect the rights and obligations under that rule", since it is these rights and obligations that are the subject of both the customary rule and the treaty rule
- While some members saw no need for such a change, the word "rule" was found to be preferable to the word "norm" and
- In the interest of harmonization with the other guidelines contained in the fourth part of the Guide to Practice, the phrase "the reserving State or international organization" was replaced with "the reserving State or organization"

4.4.3 Absence of effect on a peremptory norm of general international law (*jus cogens*)

A reservation to a treaty provision which reflects a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of that norm, which shall continue to apply as such between the reserving State or organization and other States or international organizations.

Commentary

(1) The consequence of guidelines 4.4.1 and 4.4.2 is that a reservation and the reactions that it elicits neither modify nor exclude the application of other treaty or customary rules that bind the parties. This principle applies *a fortiori*, of course, when the treaty rule reflects a peremptory norm of general international law (*jus cogens*).

(2) In this connection the Commission, after an intense debate, adopted guideline 3.1.9, which deals in part with this issue:

> 3.1.9 Reservations contrary to a rule of *jus cogens*
>
> A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law.[782]

(3) It may be thought that guideline 3.1.9 has more to do with the effects of a reservation than it does with the question of its validity.[783] Yet contrary to what it had decided with regard to reservations to a treaty provision reflecting a customary rule,[784] the Commission did not simply move guideline 3.1.9 to the fourth part of the Guide to Practice: as drafted, this guideline does not directly address the question of the effects of reservations to a provision reflecting a peremptory norm of general international law.

(4) As there is no reason that the principle applicable to reservations to a provision reflecting a customary rule should not be transposed to reservations to a provision reflecting a peremptory norm, and as the problem arises in the same terms, guideline 4.4.3 is worded similarly to guideline 4.4.2. However, in order not to give the impression that some States might not be bound by the peremptory norm of international law in question, which *ex hypothesi* is applicable to all States and international organizations,[785] the phrase "which are bound by that rule", which appears at the end of guideline 4.4.2, was omitted. In addition, despite a view to the contrary, the Commission saw no reason to include the words "of

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[782] *Ibid.*, p. 99.

[783] *Ibid.*, pp. 103–104, para. (12) of the commentary to guideline 3.1.9.

[784] See paragraph (6) of the commentary to guideline 4.4.2 above.

[785] Subject to the possible existence of regional peremptory norms, which the Commission does not intend to address.

itself"[786] in guideline 4.4.3: doubtless the notion of *jus cogens* will continue to evolve,[787] but it seems unlikely that a reservation can contribute to destabilizing a norm presenting such a degree of binding force.

4.5 Consequences of an invalid reservation

Commentary

(1) Neither the 1969 nor the 1986 Vienna Convention deals explicitly with the question of the legal effects of a reservation that does not meet the conditions of permissibility and formal validity established in articles 19 and 23, which, taken together, suggest that the reservation can be considered established in respect of another contracting State or another contracting organization as soon as that State or organization has accepted it in accordance with the provisions of article 20. The *travaux préparatoires* on the provisions of these two Conventions that concern reservations are equally unrevealing as to the effects — or lack thereof — that result from the invalidity of a reservation.

(2) The effects attributed to a non-established reservation by the Commission's early Special Rapporteurs arose implicitly from their adherence to the traditional system of unanimity: the author of such a reservation could not claim to have become a party to the treaty. Moreover, it was not a question of determining the effects of a reservation that did not fulfil certain conditions of validity, since such conditions were of little relevance under the wholly intersubjective system,[788] but rather of determining the effects of a reservation which had not been accepted by all the other contracting States and which, for that reason, did not become "part of the bargain between the parties".[789]

(3) From this perspective, J.L. Brierly wrote in 1950 that "the acceptance of a treaty subject to a reservation is ineffective unless or until every State or international organization whose consent is requisite to the effectiveness of that reservation has consented thereto".[790] H. Lauterpacht expressed the same idea: "A signature, ratification, accession, or any other method of accepting a multilateral treaty is void if accompanied by a reservation or reservations not agreed to by all other parties to the treaty."[791] Thus, unless a reservation is established in this manner, it produces no effect and nullifies the consent to be bound by the treaty. The League of Nations Committee of Experts for the Progressive Codification of International Law had already stressed that a "null and void" reservation had no effect:

> In order that any reservation whatever may be validly made in regard to a clause of the treaty, it is essential that this reservation should be accepted by all the contracting parties, as would have been the case if it had been put forward in the course of the negotiations. If not, the reservation, like the signature to which it is attached, is null and void.[792]

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[786] See paragraph (8) of the commentary to guideline 4.4.2 above.

[787] See article 64 of the Vienna Conventions (Emergence of a new peremptory norm of international law (*jus cogens*)).

[788] See, however, para. (4) below.

[789] J.L. Brierly, report on the law of treaties (A/CN.4/23), *Yearbook ... 1950*, vol. II, p. 241, para. 96. See also *ibid.*, vol. I, 53rd meeting, 23 June 1953, p. 90, para. 3 (Brierly).

[790] Draft article 10, para. 3, in Brierly, report on the law of treaties (A/CN.4/23), p. 240, *Yearbook ... 1950*, vol. II, p. 224.

[791] Draft article 9 in Lauterpacht, report on the law of treaties (A/CN.4/63), *Yearbook ... 1953*, vol. II, p. 91.

[792] League of Nations, *Official Journal*, eighth year, No. 7, p. 880.

Under this system, the issue is the ineffectiveness, rather than the invalidity, of a reservation; consent alone establishes its acceptability or unacceptability to all the other contracting parties.

(4) However, even Brierly, though a strong advocate of the system of unanimity, was aware that there might be reservations which, by their very nature or as a result of the treaty to which they referred, might *ipso jure* have no potential effect. In the light of treaty practice, he considered that some treaty provisions "allow only certain reservations specified in the text, and prohibit all others; these do not bear on the position of a depositary or the question of States being consulted in regard to reservations, for *such questions cannot arise as no reservations at that stage are permissible*".[793] It followed that States were not free to "agree upon any terms in the treaty",[794] as he had maintained the previous year; there were indeed reservations that could not be accepted because they were prohibited by the treaty itself. Gerald Fitzmaurice endorsed this idea in his draft article 37, paragraph 3, which stated:

> In those cases where the treaty itself permits certain specific reservations, or a class of reservations, to be made, there is a presumption that any other reservations are excluded and cannot be accepted.[795]

(5) The situation changed with Sir Humphrey Waldock's first report. The fourth Special Rapporteur on the law of treaties, a supporter of the flexible system, deliberately made the sovereign right of States to formulate reservations subject to certain conditions of validity. Despite the uncertainty concerning his position on the permissibility of reservations that are incompatible with the object and purpose of the treaty,[796] draft article 17, paragraph 1, (in his first report) "accepts the view that, *unless the treaty itself, either expressly or by clear implication, forbids or restricts the making of reservations*, a State is free, in virtue of its sovereignty, to formulate such reservations as it thinks fit".[797] However, Sir Humphrey did not deem it appropriate to specify the effects arising from the formulation of a prohibited reservation; in other words, he set the criteria for the permissibility of reservations without establishing the regime governing reservations which did not meet them.[798]

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[793] Report on reservations to multilateral conventions (A/CN.4/41), para. 11; *Yearbook ... 1951*, vol. II, p. 3 (emphasis added). In annex C to his report, the Special Rapporteur provided examples from the Convention providing a Uniform Law for Bills of Exchange and Promissory Notes (1930), the Convention providing a Uniform Law for Cheques (1931) and the 1948 Protocol amending the International Convention on Economic Statistics, signed at Geneva on 14 December 1928.

[794] Brierly, report on the law of treaties (A/CN.4/23), para. 88; *Yearbook ... 1950*, vol. II, p. 239.

[795] Brierly, report on the law of treaties (A/CN.4/101); *Yearbook ... 1956*, vol. II, p. 115.

[796] Waldock, first report on the law of treaties (A/CN.4/144); *Yearbook ... 1962*, vol. II, pp. 65–66, para. (10) of the commentary to draft article 17. See also paras. (2) and (3) of the commentary to guideline 3.1 (Permissible reservations), in *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), pp. 328–329.

[797] Waldock, first report on the law of treaties (A/CN.4/144); *Yearbook ... 1962*, vol. II, pp. 65–66, *Yearbook ... 1962*, vol. II, p. 65, para. (9) of the commentary to draft article 17 (emphasis Waldock's). See also *ibid.*, p. 67, para. (15) of the commentary to draft article 18. See also the Commission's debate, *Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 143, para. 64 (Mustafa Kamil Yasseen) and the conclusions of the Special Rapporteur, *ibid.*, 653rd meeting, 29 May 1962, p. 159, para. 57 (Waldock).

[798] During the debate, Alfred Verdross expressed the view that the case of a "treaty which specifically prohibited reservations ... did not present any difficulties" (*ibid.*, 652nd meeting, 28 May 1962, p. 148, para. 33), without, however, taking a clear position regarding the effects of the violation of such a specific prohibition. The members of the Commission were, however, aware that the problem could arise, as seen from the debate on draft article 27 on the functions of a depositary (*Yearbook ... 1962*, vol. I, 658th meeting, 6 June 1962, para. 59, p. 191 (Waldock); and *ibid.*, 664th meeting, 19 June

(6) Sir Humphrey's first report does, however, contain several reflections on the effects of a reservation that it is prohibited by the treaty:

> when a reservation is formulated which is not prohibited by the treaty, the other States are called upon to indicate whether they accept or reject it but, when the reservation is one prohibited by the treaty, they have no need to do so, for they have already expressed their objection to it in the treaty itself.[799]

While this explanation does not directly address the question of the effect of prohibited reservations, it has the merit of suggesting that they are excluded from the scope of the provisions concerning the consent of the contracting States and, subsequently, of all the provisions concerning the effects of reservations with the exception of the potential validation of an otherwise inadmissible reservation through the unanimous consent of all the contracting States.[800]

(7) For a long time, the Commission gave separate — and rather confusing — treatment to the question of reservations that are incompatible with the object and purpose of the treaty, and that of prohibited reservations. Thus, paragraph 2 (b) of draft article 20 (Effects of reservations), adopted by the Commission on first reading, envisaged the legal effect of a reservation only in the context of an objection to it made on the grounds of its incompatibility with the object and purpose of the treaty:

> An objection to a reservation by a State which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the objecting and the reserving State, unless a contrary intention shall have been expressed by the objecting State.[801]

(8) It is also clear from this statement that the effect of an objection — which was (at that time) also subject to the requirement that it must be compatible with the object and purpose of the treaty, in accordance with the advisory opinion of the International Court of Justice[802] — was envisaged only in the case of reservations that were incompatible (or deemed incompatible) with the object and purpose of the treaty. In 1965, however, in response to several States' criticism of this restriction of the right to make objections to

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1962, paras. 82–95, p. 236.

[799] *Ibid.*, vol. II, p. 65, para. (9) of the commentary to draft article 17. In that connection, see Brierly, report on the law of treaties (A/CN.4/23), para. 88; *Yearbook ... 1950*, vol. II, p. 239.

[800] Draft article 17, para. 1 (b), in Waldock, first report on the law of treaties (A/CN.4/144); *Yearbook ... 1962*, vol. II, p. 60: "The formulation of a reservation, the making of which is expressly prohibited or impliedly excluded under any of the provisions of subparagraph (a), is inadmissible unless the prior consent of all the other interested States has been first obtained." See also draft article 18 as proposed by Waldock in his fourth report on the law of treaties (A/CN.4/177 and Add.1 and 2); *Yearbook ... 1965*, vol. II, p. 50. On the question of the unanimous consent of the contracting States and contracting organizations, see guideline 3.3.3 above and the commentary thereto, in particular paragraph (3).

[801] *Yearbook ... 1962*, vol. II, p. 176.

[802] In 1951, the Court stated: "it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation" (*I.C.J. Reports 1951* (see footnote 305 above), p. 24). For a thorough analysis of the differences between the legal system adopted by the Commission and the Court's 1951 advisory opinion, see J.K. Koh, footnote 499 above, pp. 88–95.

reservations, the Special Rapporteur proposed new wording[803] in order to make a clearer distinction between objections and the validity of reservations. But as a result, invalid reservations fell outside of the work of the Commission and the Conference and would remain so until the adoption of the Vienna Convention.

(9) The fact that the 1969 Vienna Convention contains no rules on invalid reservations is, moreover, a consequence of the wording of article 21, paragraph 1, on the affect of acceptance of a reservation: only reservations that are permissible under the conditions established in article 19, formulated in accordance with the provisions of article 23 and accepted by another contracting party in accordance with article 20[804] can be considered established under the terms of this provision. Clearly, a reservation that is not valid does not meet these cumulative conditions, even if it has been accepted by one or more contracting parties.

(10) This explanation is not, however, included in article 21, paragraph 3, on objections to reservations. But that does not mean that the Convention determines the legal effects of an invalid reservation to which an objection has been made: under article 20, paragraph 4 (c), in order for such an objection to produce the effect envisaged in article 21, paragraph 3, at least one acceptance is required;[805] however, the effects of acceptance of an invalid reservation are not governed by the Convention.

(11) The *travaux* of the Vienna Conference clearly confirm that the 1969 Convention says nothing about the consequences of invalid reservations, let alone their effects. In 1968, during the first session of the Conference, the United States of America proposed to add, in the chapeau of future article 20, paragraph 4, after "In cases not falling under the preceding paragraphs", the following specification: "and unless the reservation is prohibited by virtue of [future article 19]:".[806] According to the explanation given by Herbert W. Briggs, the United States representative, in support of the amendment:

> The purpose of the United States amendment to paragraph 4 was to extend the applicability of the prohibited categories of reservations set out in article 16 to the decisions made by States under paragraph 4 of article 17 in accepting or objecting to a proposed reservation. In particular, the proposal would preclude acceptance by another contracting State of a reservation prohibited by the treaty, and the test of incompatibility with the object or purpose of the treaty set out in subparagraph (*c*) of article 16 would then be applicable to such acceptance or objection. It was a shortcoming of subparagraph (*c*) that it laid down a criterion of incompatibility for a

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[803] Sir Humphrey Waldock, fourth report on the law of treaties (A/CN.4/177 and Add.1 and 2), *Yearbook ... 1965*, vol. II, p. 52, para. (9) of the commentary to draft article 19. Draft article 19, paragraph 4, as proposed by Waldock, states:

> 4. In other cases, unless the State [*sic* – read 'the treaty'?] concerned otherwise specifies:
>
> (a) acceptance of a reservation by any party constitutes the reserving State a party to the treaty in relation to such party;
>
> (b) objection to a reservation by any party precludes the entry into force of the treaty as between the objecting and the reserving State.

[804] See guideline 4.1 above (Establishment of a reservation with regard to another State or another organization) and the commentary thereto.

[805] See paras. (2) and (3) of the commentary to guideline 4.3.2.

[806] A/CONF.39/C.1/L.127, reproduced in *United Nations Conference on the Law of Treaties, Documents of the Conference* (A/CONF.39/11/Add.2), footnote 313 above, p. 136, para. 179 (v) (d).

prohibited reservation, but failed to make it explicitly applicable to the acceptance or objection to a reservation.[807]

(12) Although it is unclear from Briggs' explanations, which focus primarily on extending the criteria for the permissibility of a reservation to include acceptances and objections, the effect of the United States amendment would unquestionably have been that the system of acceptances of and objections to reservations established in article 20, paragraph 4, applied only to reservations that met the criteria for permissibility under article 19. Acceptance of and objection to an impermissible reservation are clearly excluded from the scope of this amendment[808] even though no new rule concerning such reservations was proposed. The representative of Canada, Max H. Wershof, then asked, "Was paragraph C of the United States amendment (A/CONF.39/C.1/L.127) consistent with the intention of the International Law Commission regarding incompatible reservations?"[809] Sir Humphrey, in his capacity as Expert Consultant, replied: "The answer was ... Yes, since it would in effect restate the rule already laid down in article 16."[810]

(13) The "drafting" amendment proposed by the United States was sent to the Drafting Committee.[811] However, neither the language that was provisionally adopted by the Committee and submitted to the Committee of the Whole on 15 May 1968,[812] nor the language ultimately adopted by the Committee of the Whole and referred to the plenary Conference,[813] contained the wording proposed by the United States, although the failure to incorporate it is not explained in the published materials of the Conference. It is, however, clear that the Commission and the Conference considered that the case of impermissible reservations was not the subject of express rules adopted at the conclusion of their work and that the provisions of articles 20 and 21 of the Vienna Convention did not apply to that situation.

(14) During the Commission's work on the question of treaties concluded between States and international organizations or between two or more international organizations and the work of the 1986 Vienna Conference, the question of the potential effects of a reservation formulated despite the conditions for permissibility in article 19 was not addressed. Nevertheless, Paul Reuter, Special Rapporteur of the Commission on the topic, recognized that "even in the case of treaties between States, the question of reservations has always been a thorny and controversial issue, and even the provisions of the Vienna Convention

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[807] *United Nations Conference on the Law of Treaties, First Session, Summary records* (A/CONF.39/11), footnote 313 above, 21st plenary meeting of the Committee of the Whole, 10 April 1968, p. 108, para. 11.

[808] It is, however, not entirely clear why the same restriction should not apply to the cases covered by paragraph 2 (treaties that must be applied in their entirety) and paragraph 3 (constituent instruments of international organizations).

[809] *United Nations Conference on the Law of Treaties, First Session, Summary records* (A/CONF.39.11), footnote 313 above, 24th meeting, 16 April 1968, pp. 132–133, para. 77.

[810] *Ibid.*, 25th meeting, 16 April 1968, p. 133, para. 4. Draft article 16 became article 19 of the Convention.

[811] *Ibid.*, pp. 135–136, para. 38.

[812] A/CONF.39/C.1/L.344, reproduced in *Official Records of the United Nations Conference on the Law of Treaties* (see footnote 313 above), p. 137, para. 185.

[813] The language was approved by 60 votes to 15, with 13 abstentions (*United Nations Conference on the Law of Treaties, Second Session, Summary records* (A/CONF.39/11/Add.1), footnote 339 above, 85th meeting of the Committee of the Whole, 10 April 1969, paras. 33–34), p. 221. For the text of this provision, see *Documents of the Conference* (A/CONF.39/11/Add.2), footnote 313 above, p. 258, para. 57.

have not eliminated all these difficulties".[814] Nonetheless, the Special Rapporteur "thought it wise not to depart from that Convention where the concept of reservations was concerned".[815]

(15) In its observations on the Human Rights Committee's general comment No. 24, the United Kingdom also recognized, at least in principle,[816] that the 1969 Vienna Convention did not cover the question of impermissible reservations:

> The Committee correctly identifies articles 20 and 21 of the Vienna Convention on the Law of Treaties as containing the rules which, taken together, regulate the legal effect of reservations to multilateral treaties. The United Kingdom wonders however whether the Committee is right to assume their applicability to incompatible reservations. The rules cited clearly do apply to reservations which are fully compatible with the object and purpose but remain open for acceptance or objection (...). It is questionable however whether they were intended also to cover reservations which are inadmissible *in limine*.[817]

(16) Admittedly, neither the 1969 nor the 1986 Vienna Convention — which are largely similar, including in this respect — contains clear and precise rules concerning the effects of an invalid reservation.[818] That is, without a doubt, one of the most serious lacunae in the matter of reservations in the Vienna Conventions. It has been referred to as a "normative gap", and the gap is all the more troubling in that the *travaux préparatoires* do not offer any clear indications as to the intentions of the authors of the 1969 Convention, but instead give the impression that they deliberately left the question open. However, what was acceptable in a general treaty on the law of treaties in view of the differences raised by the question is not acceptable when the aim is precisely to fill the gaps left by the Vienna Conventions in the matter of reservations.

(17) In this area, it is particularly striking that "the 1969 Vienna Convention has not frozen the law. Regardless of the fact that it leaves behind many ambiguities, that it contains gaps on sometimes highly important points and that it could not foresee rules applicable to problems that did not arise, or hardly arose, at the time of its preparation (...), the Convention served as a point of departure for new practices that are not, or not fully, followed with any consistency at the present time".[819] In accordance with the method of

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[814] Reuter, tenth report on the question of treaties concluded between States and international organizations or between two or more international organizations (A/CN.4/341 and Add. 1), para. 53; *Yearbook ... 1981*, vol. II, Part One, p. 56, para. 53. The Special Rapporteur referred to P.-H. Imbert, *Les réserves aux traités multilatéraux*, *op. cit.*, footnote 522 above; and, by the same author, "La question des réserves dans la décision arbitrale du 30 juin 1977, *op. cit.*, footnote 516 above, pp. 29–58.

[815] *Yearbook ... 1977*, vol. I, 1,434th meeting, 6 June 1977, p. 98, para. 4 (Paul Reuter).

[816] See footnote 855 below. While the United Kingdom considered that inadmissible reservations were not covered by the Vienna Conventions, the solution that it proposed was, ultimately, simply to apply article 21, paragraph 3, of the Conventions to them.

[817] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (A/50/40), vol. I, p. 133, para. 13.

[818] In that regard, see G. Gaja, "Il regime della Convenzione di Vienna concernente le riserve inammissibili", footnote 728 above, pp. 349–361; Bruno Simma, "Reservations to human rights treaties: some recent developments", in *Liber Amicorum, Professor Ignaz Seidl-Hohenveldern in Honour of His 80th Birthday* (The Hague: Kluwer, 1998), pp. 667–668; and Christian Tomuschat, "International Law: Ensuring the Survival of Mankind on the Eve of a New Century", *Recueil des Cours de L'Academie de Droit International de la Haye*, vol. 281 (1999), p. 321.

[819] Alain Pellet, first report on the law and practice relating to reservations to treaties (A/CN.4/470, para. 161); *Yearbook ... 1995*, vol. II, Part One, p. 152.

work that has been followed by the Commission in the preparation of the Guide to Practice,[820] it has assumed that the treaty rules — which are silent on the question of the effects of invalid reservations — are established, and that it "simply try to fill the gaps and, where possible and desirable, to remove their ambiguities while retaining their versatility and flexibility".[821]

(18) In so doing, the Commission had not intended to legislate and to establish *ex nihilo* rules concerning the effects of a reservation that does not meet the criteria for validity. State practice, international jurisprudence and doctrine have already developed approaches and solutions on this matter which the Commission considers perfectly suitable for guiding its work. It is a question not of creating, but of systematizing, the applicable principles and rules in a reasonable manner while introducing elements of progressive development, and of preserving the general spirit of the Vienna system.

(19) The title of section 4.5 of the Guide to Practice "Consequences of an invalid reservation" was preferred over the one that was initially proposed, "Effects of an invalid reservation"[822] because the main consequence of these instruments is, precisely, that they are devoid of legal effects.

(20) Furthermore, it should be noted that invalid reservations, whose consequences are explicitly set out in this section of the Guide to Practice, are invalid either because they do not meet the formal and procedural requirements prescribed in Part 2 or because they are deemed impermissible according to the provisions of Part 3. The use of the words "validity/invalidity" and "valid/invalid" is consistent with the broad definition of the expression "validity of reservations" adopted by the Commission in 2006 in order "to describe the intellectual operation consisting in determining whether a unilateral statement made by a State or an international organization and purporting to exclude or modify the legal effect of certain provisions of the treaty in their application to that State or organization was capable of producing the effects attached in principle to the formulation of a reservation".[823]

4.5.1 [3.3.2, later 4.5.1 and 4.5.2] Nullity of an invalid reservation

A reservation that does not meet the conditions of formal validity and permissibility set out in Parts 2 and 3 of the Guide to Practice is null and void, and therefore devoid of legal effect.

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[820] In 2006, during the Commission's consideration of the tenth report on reservations to treaties, "[i]t was even questioned whether the Commission should take up the matter of the consequences of the invalidity of reservations, which, perhaps wisely, had not been addressed in the Vienna Conventions. Perhaps that gap should not be filled; the regime that allowed States to decide on the validity of reservations and to draw the consequences already existed, and there was no reason to change it" (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 142). In the Sixth Committee, however, this was said to be a key issue for the study (A/C.6/61/SR.17, para. 5 (France)). Several delegations supported the idea that impermissible reservations were null and void (A/C.6/61/SR.16, para. 43 (Sweden); *ibid.*, para. 51 (Austria); and A/C.6/61/SR.17, para. 7 (France)); it was hoped that the specific consequences arising from that nullity would be spelled out in the Guide to Practice (A/C.6/61/SR.16, para. 59 (Canada)). See also the fourteenth report on reservations to treaties (2009) (A/CN.4/614), para. 14.

[821] First report on the law and practice relating to reservations to treaties (A/CN.4/470), para. 163; *Yearbook ... 1995*, vol. II, Part One, p. 152.

[822] Fifteenth report on reservations to treaties (A/CN.624/Add.1), para. 419.

[823] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), p. 324, para. (2) of the general introduction to Part 3 of the Guide to Practice.

Commentary

(1) By clearly indicating that a reservation that does not meet the conditions of formal validity and permissibility set out in Parts 2 and 3 of the Guide to Practice is null and void and by formally stating the consequence that it is devoid of effect, guideline 4.5.1 aims to fill one of the major gaps in the Vienna Conventions, which deliberately left this question unanswered,[824] despite its very great practical importance.

(2) This guideline, which is probably one of the most important provisions in the Guide to Practice, does not duplicate guideline 3.3 (Consequences of the impermissibility of a reservation).[825] First of all, it deals with both the formal invalidity and the impermissibility of reservations;[826] whereas Part 3, and in particular the first three sections thereof, concerns only the permissibility of reservations. There is no reason to exclude from the conditions for the validity of a reservation — which, if not met, render the reservation null and void — those which concern form. A reservation which was not formulated in writing,[827] was not communicated to the other concerned parties[828] or was formulated late[829] is also, in principle, unable to produce legal effects; it is null and void.[830] Secondly, guideline 4.5.1 is "downstream" from guidelines 3.1 and 3.3.2, of which it draws the consequences: the latter establish the conditions under which a reservation is impermissible, while guideline 4.5.1 infers from such impermissibility that the reservation is null and void, and produces no legal effects.

(3) The purpose of the phrase "null and void" is to recall that this nullity is not dependent on the reactions of other contracting States or contracting organizations, something that guidelines 3.3.2 and 4.5.3 state even more clearly.

(4) While the nullity of a reservation and the consequences or effects of that nullity are certainly interdependent, they are two different issues. It is not possible first to consider the effects of an impermissible reservation and then to deduce its nullity: the fact that a legal act produces no effect does not necessarily mean that it is null and void. It is the characteristics of the act that influence its effects, not the other way around. In that regard, the nullity of an act is merely one of its characteristics, which, in turn, influences the capacity of the act to produce or modify a legal situation.

(5) With regard to acts which are null and void under civil law, the great French jurist Marcel Planiol has explained:

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[824] See above, para. (16) of the general introduction to section 4.5 of the Guide to Practice.

[825] See above, footnote 350.

[826] See above, para. (20) of the general introduction to section 4.5 of the Guide to Practice. This broad scope explains why guideline 4.5.1 is in Part 4 and not Part 3 of the Guide to Practice (see *a contrario* the reasons for the inclusion of guideline 3.3.2 in Part 3, in paras. (5) to (7) of the commentary to the latter (see also para. (11) of the commentary to guideline 3.3.3)).

[827] Art. 23, para. 1, of the Vienna Conventions. See also guideline 2.1.1 (Written form), *Yearbook ... 2002*, vol. II (Part II), p. 26.

[828] Art. 23, para. 1, of the Vienna Conventions. See also guideline 2.1.5 (Communication of reservations), *ibid.*, p. 26.

[829] See guideline 2.3 (Late reservations) and guidelines 2.3.1 (Late formulation of a reservation) to 2.3.5 (Widening of the scope of a reservation), *Yearbook ... 2001*, vol. II (Part Two), p. 179 ... and *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), pp. 269–274.

[830] In addition, guideline 4.5 is the equivalent for invalid reservations of guideline 4.1 for valid reservations (established reservations): these guidelines both related to the two types of conditions (substantive or formal) that allow a reservation to be considered "established", in the first case (provided that it was also accepted by at least one other contracting State or contracting organization) or "invalid", in the second case.

> *[u]n acte juridique est nul lorsqu'il se trouve privé d'effets par la loi, bien qui'il ait été réellement accompli, et qu'aucun obstacle ne le rende inutile. La nullité suppose que l'acte pourrait produire tous ses effets, si la loi le permettait* [a legal act is null and void when it is deprived of effect by law, even if it was in fact carried out and no obstacle renders it useless. Nullity presupposes that the act could produce all of its effects if the law allowed it to do so].[831]

> The Dictionnaire du droit international public defines "nullity" as a

> "*caractéristique d'un acte juridique, ou d'une disposition d'un acte, dépourvu de valeur juridique, en raison de l'absence des conditions de forme ou de fond nécessaires pour sa validité*" [characteristic of a legal act or of a provision of an act, lacking legal value due to the absence of formal or substantive requirements necessary for its validity].[832]

This is precisely the situation in the case of a reservation which does not meet the criteria for permissibility under article 19 of the Vienna Conventions: it does not meet the requirements for permissibility and, for this reason, has no legal value. Had the reservation met the requirements for permissibility, it could have produced legal effects.

(6) Leaving it to the contracting parties to assess the permissibility of a reservation ultimately amounts to denying any *effet utile* to article 19 of the Vienna Conventions (the 1986 text of which is reproduced in guideline 3.1), even though it is central to the Vienna regime and formulates (*a contrario*, at least) the conditions for the permissibility of reservations not as a set of factors which States and international organizations should take into account, but in prescriptive language.[833] The opposite position would imply that, by accepting a reservation that does not meet the conditions for permissibility established in the 1969 and 1986 Vienna Conventions, States can validate it; this would deprive article 19 of any substance and would contradict guideline 3.3.2.

(7) It therefore is reasonable and in line with the logic of the Vienna regime to establish this solution on which those who espouse permissibility and those who espouse opposability[834] agree, and which also accords with the positions taken by the human rights treaty bodies,[835] namely that failure to respect the conditions for the permissibility of reservations laid down in article 19 of the Vienna Conventions and repeated in draft guideline 3.1 nullifies the reservation. The nullity of an impermissible reservation is in no way a matter of *lex ferenda*; it is solidly established in State practice.

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[831] Cited by Paul Guggenheim, "La validité et la nullité des actes juridiques internationaux", *Receuil des Cours de l'Académie de Droit International de la Haye*, vol. 74, 1949-I, p. 208.

[832] Jean Salmon (Ed.), *Dictionnaire de droit international public* (Brussels: Bruylant, 2001), p. 760 (*nullité*).

[833] "A State may … formulate a reservation, unless …" which clearly means "a State *cannot* formulate a reservation *if* …".

[834] Even though they do not draw all the consequences. On the opposition between these two "schools", see the introductory commentary to Part 3 of the Guide to Practice (Permissibility of reservations and interpretative declarations), para. (3) (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), p. 342); see also the preliminary report on reservations to treaties, A/CN.4/470, *Yearbook ... 1995*, pp. 155–156, paras. 101–105.

[835] See para. (16) of the commentary to guideline 3.2 (*Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), p. 295, as well as the commentary to guidelines 3.2.1 (Competence of the treaty monitoring bodies to assess the permissibility of a reservation) and 3.2.2 (Specification of the competence of treaty monitoring bodies to assess the permissibility of reservations), *ibid.*, pp. 296–299.

(8) It is not unusual for States to formulate objections to reservations which are incompatible with the object and purpose of the treaty while at the same time noting that they consider the reservation to be "null and void".

(9) As early as in 1955 and 1957, upon ratifying the 1949 Geneva Conventions, the United Kingdom and the United States of America made objections to reservations formulated by several Eastern European States, stating that, since the reservations in question were null and void, the Conventions in their entirety applied to the reserving States. Thus, the United Kingdom declared that

> whilst they regard all the above-mentioned States as being parties to the above-mentioned Conventions, they do not regard the above-mentioned reservations thereto made by those States as valid, and will therefore regard any application of any of those reservations as constituting a breach of the Convention to which the reservation relates.[836]

For its part, in 1982,

> the Government of the Union of Soviet Socialist Republics [did] not recognize the validity of the reservation made by the Government of the Kingdom of Saudi Arabia on its accession to the 1961 Vienna Convention on Diplomatic Relations, since that reservation [was] contrary to one of the most important provisions of the Convention, namely, that "the diplomatic bag shall not be opened or detained".[837]

Similarly, Italy formulated an objection to the reservation to the International Covenant on Civil and Political Rights formulated by the United States:

> In the opinion of Italy reservations to the provisions contained in article 6 are not permitted, as specified in article 4, paragraph 2, of the Covenant. Therefore this reservation is null and void since it is incompatible with the object and the purpose of article 6 of the Covenant.[838]

In 1995, Finland, the Netherlands and Sweden made objections that were comparable to the declarations formulated by Egypt upon acceding to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. In its objection, the Netherlands stated:

> the Kingdom of the Netherlands considers the declaration on the requirement of prior permission for passage through the territorial sea made by Egypt a reservation which is null and void.[839]

The Governments of Finland and Sweden also stated in their objections that they considered the declarations to be null and void.[840] The reactions of Sweden to reservations judged invalid frequently contain this statement, regardless of whether the reservation is prohibited by the treaty,[841] was formulated late[842] or is incompatible with the object and purpose of the treaty.[843] In the latter category, Sweden's reaction to the declaration in respect of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment formulated by the German Democratic Republic[844] is particularly explicit:

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[836] United Nations, *Treaty Series*, vol. 278, 1957, p. 268. See also the identical objections in connection with the four Geneva Conventions made by the United States of America. The objection in connection with the Geneva Convention relative to the treatment of prisoners of war reads: "Rejecting the reservations which States have made with respect to the Geneva Convention relative to the treatment of prisoners of war, the United States accepts treaty relations with all parties to that Convention, except to the changes proposed by such reservations" (*ibid.*, vol. 213, 1955, p. 383).

[837] *Multilateral Treaties* ..., footnote 341 above (chap. III.3).

[838] *Ibid.* (chap. IV.4).

[839] *Ibid.* (chap. XXVII.3). Art. 26, para. 1, of the Basel Convention stipulates that "No reservation or exception may be made to this Convention."

[840] *Ibid.* (chap. XXVII.3).

> The Government of Sweden has come to the conclusion that the declaration made by the German Democratic Republic is incompatible with the object and purpose of the Convention and therefore is invalid according to article 19 (c) of the Vienna Convention on the Law of Treaties.[845]

(10) This objection makes it clear that the nullity of the reservation is a consequence not of the objection made by the Government of Sweden, but of the fact that the declaration made by the German Democratic Republic does not meet the requirements for the permissibility of a reservation. This is an objective issue which does not depend on the reactions of the other contracting parties, even if they might help to assess the compatibility of the reservation with the requirements of article 19 of the Vienna Conventions as reflected in guideline 3.1 (Permissible reservations).[846]

(11) It is not a question of granting the parties a competence which is clearly not theirs; individually, the contracting States and contracting organizations are not authorized to determine the nullity of an invalid reservation.[847] Moreover, that is not the purpose of these objections and they should not be understood in that manner.

(12) However, and this is particularly important in a system that lacks a control and annulment mechanism, such objections express the views of their authors on the question of the validity and effects of an invalid reservation[848] and are of particular importance in the context of the reservations dialogue. As the representative of Sweden pointed out in 2005 in the Sixth Committee:

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[841] See footnote 840 above.

[842] Sweden's objection to Egypt's late declaration to the Basel Convention was, however, justified by both the Convention's prohibition of reservations and the fact that "these declarations were made almost two years after the accession by Egypt contrary to the rule laid down in article 26, paragraph 2 of the Basel Convention" (*ibid.*). Finland, however, justified its objection based solely on the fact that the declarations were, in any event, late (*ibid.*). Belgium also considered that the declarations formulated by Egypt were late and that "for these reasons, the deposit of the aforementioned declarations cannot be allowed, regardless of their content" (*ibid.*).

[843] See Sweden's objections to the reservations to the International Covenant on Civil and Political Rights formulated by Mauritania and the Maldives (*ibid.*, chap. IV.4); its objections to the reservations to the Convention on the Elimination of All Forms of Discrimination against Women formulated by the Democratic People's Republic of Korea, Bahrain, the Federated States of Micronesia, the United Arab Emirates, Oman and Brunei (*ibid.*, chap. IV.8) and its objections to the reservation and interpretive declaration to the Convention on the Rights of Persons with Disabilities formulated by El Salvador and Thailand, respectively (*ibid.*, chap. IV.15).

[844] The German Democratic Republic had declared upon signing and ratifying the Convention that it "will bear its share only of those expenses in accordance with article 17, paragraph 7, and article 18, paragraph 5, of the Convention arising from activities under the competence of the Committee as recognized by the German Democratic Republic" (*ibid.*, chap. IV.9). See also the third report on reservations to treaties (A/CN.4/491 and Add.1 through 6), para. 217; *Yearbook ... 1998*, vol. II, Part One, p. 259.

[845] *Ibid.* (chap. IV.9).

[846] See also paras. (1) to (3) of the commentary to guideline 3.3.2 above.

[847] See also J. Klabbers, footnote 660 above, p. 184.

[848] See also guideline 3.2 (Assessment of the permissibility of reservations), *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), pp. 283–296.

> Theoretically, an objection was not necessary in order to establish that fact but was merely a way of calling attention to it. The objection therefore had no real legal effect of its own and did not even have to be seen as an objection per se; consequently, the time limit of 12 months specified in article 20, paragraph 5, of the Convention, should not apply. However, in the absence of a body that could authoritatively classify a reservation as invalid, such as the European Court of Human Rights, such "objections" still served an important purpose.[849]

(13) It is also highly significant that in formulating objections to reservations that they consider invalid, States often pay very little attention to the conditions governing the efficacy of their objections. With regard to the Convention against Torture, for example, nine States[850] formulated objections against 4 reservations; of the 18 objections, 12 were late, which tends to show that their authors were convinced that the nullity of the reservations in question did not depend on their negative reactions but pre-dated their formulation. In other words, these objections *recognize* a pre-existing nullity based on objective criteria.

(14) Simply to state that a reservation is null and void, as in the first part of guideline 4.5.1, does not resolve the question of the effects — or lack thereof — of this nullity on the treaty and on potential treaty relations between the author of the reservation and the other contracting parties; the Vienna Conventions are silent on this matter.[851] It is therefore necessary to refer to the basic principles underlying all the law of treaties (beginning with the rules applicable to reservations), and above all, to the principle of consent.

(15) Many objections are formulated in respect of reservations that are considered impermissible, either because they are prohibited by the treaty or because they are incompatible with its object and purpose, without precluding the entry into force of the treaty. This practice is fully consistent with the principle set out in article 20, paragraph 4 (b), and article 21, paragraph 3, of the Vienna Conventions, although it might seem surprising that it was primarily (but not exclusively) the Western States which, at the Vienna Conference, expressed serious misgivings regarding the reversal of the presumption that was strongly supported by the Eastern countries.[852] But the fact that the treaty remains in force does not answer the question of the status of the reservation.

(16) Belgium's objection to the reservations of the United Arab Republic and the Kingdom of Cambodia to the Convention on Diplomatic Relations illustrates the problem. Upon ratifying the Convention in 1968, the Belgian Government stated that it considered

> "the reservation made by the United Arab Republic and the Kingdom of Cambodia to paragraph 2 of article 37 to be incompatible with the letter and spirit of the Convention",[853]

without drawing any particular consequences. But in 1975, in reaction to the confirmation of these reservations and to a comparable reservation by Morocco, Belgium explained:

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[849] A/C.6/60/SR.14, para. 22.

[850] Denmark, France, Finland, Germany, Luxembourg, the Netherlands, Norway, Spain and Sweden (*Multilateral Treaties* ..., footnote 341 above, chap. IV.9).

[851] See above, commentary to the introduction to section 4.5, paras. (1) to (13).

[852] See above, commentary to guideline 4.3.4 (Non-entry into force of the treaty as between the author of a reservation and the author of an objection with maximum effect), paras. (7) to (13). See also the commentary to guideline 2.6.8 (Expression of intention to preclude the entry into force of the treaty), *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), p. 197, para. (1).

[853] *Multilateral Treaties* ..., footnote 341 above, chap. III.3.

> The Government of the Kingdom of Belgium objects to the reservations made with respect to article 27, paragraph 3, by Bahrain and with respect to article 37, paragraph 2, by the United Arab Republic (now the Arab Republic of Egypt), Cambodia (now the Khmer Republic) and Morocco. The Government nevertheless considers that the Convention remains in force as between it and the aforementioned States, respectively, *except in respect of the provisions which in each case are the subject of the said reservations*.[854]

In other words, according to Belgium, despite the reservations' incompatibility with "the letter and spirit" of the Convention, the latter would enter into force between Belgium and the authors of the impermissible reservations. However, the provisions to which the reservations referred would not apply as between the authors of those reservations and Belgium; this amounts to giving impermissible reservations the same effect as permissible reservations.

(17) The approach taken in Belgium's objection, which is somewhat unusual,[855] appears to correspond to the one envisaged in article 21, paragraph 3, of the Vienna Conventions in the case of a simple objection.[856]

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[854] *Ibid.* (emphasis added).

[855] See, however, the Netherlands' objection to the reservation to the International Covenant on Civil and Political Rights formulated by the United States of America:

"The Government of the Kingdom of the Netherlands objects to the reservations with respect to capital punishment for crimes committed by persons below eighteen years of age, since it follows from the text and history of the Covenant that the said reservation is incompatible with the text, the object and purpose of article 6 of the Covenant, which according to article 4 lays down the minimum standard for the protection of the right to life.

"The Government of the Kingdom of the Netherlands objects to the reservation with respect to article 7 of the Covenant, since it follows from the text and the interpretation of this article that the said reservation is incompatible with the object and purpose of the Covenant.

"In the opinion of the Government of the Kingdom of the Netherlands this reservation has the same effect as a general derogation from this article, while according to article 4 of the Covenant, no derogations, not even in times of public emergency, are permitted.

"It is the understanding of the Government of the Kingdom of the Netherlands that the understandings and declarations of the United States do not exclude or modify the legal effect of provisions of the Covenant in their application to the United States, and do not in any way limit the competence of the Human Rights Committee to interpret these provisions in their application to the United States.

"*Subject to the proviso of article 21, paragraph 3 of the Vienna Convention of the Law of Treaties*, these objections do not constitute an obstacle to the entry into force of the Covenant between the Kingdom of the Netherlands and the United States" (*ibid.*, chap. IV.4, emphasis added).

In its observations on general comment No. 24 of the Human Rights Committee, the United Kingdom also gave some weight to the exclusion of the parties to the treaty to which a reservation relates: "[t]he United Kingdom is absolutely clear that severability would entail excising both the reservation and the parts of the treaty to which it applies. Any other solution they would find deeply contrary to principle, notably the fundamental rule reflected in Article 38 (1) of the Statute of the International Court of Justice, that international conventions establish rules 'expressly recognized by' the Contracting States. The United Kingdom regards it as hardly feasible to try to hold a State to obligations under the Covenant which it self-evidently has not 'expressly recognized' but rather has indicated its express unwillingness to accept" (*Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (A/50/40), p. 163, para. 14).

In its report to the 18th meeting of chairpersons of the human rights treaty bodies, the working group on reservations also did not completely rule out such an approach. In its recommendations, it suggested that "the only foreseeable consequences of invalidity are that the State could be considered

(18) It is, however, highly debatable; it draws no real consequences from the nullity of the reservation but treats it in the same way as a permissible reservation by letting in "through the back door" what was excluded by the authors of the 1969 and 1986 Vienna Conventions.[857] Unquestionably, nothing in the wording of article 21, paragraph 3, of the Vienna Conventions expressly suggests that it does not apply to the case of invalid reservations, but it is clear from the *travaux préparatoires* that this question was no longer considered relevant to the draft article that was the basis for this provision.[858]

(19) As the representative of Sweden, speaking on behalf of the Nordic countries, rightly explained during the Sixth Committee's debate on the report of the Commission on the work of its fifty-seventh session,

> A reservation incompatible with the object and purpose of a treaty was not formulated in accordance with article 19, so that the legal effects listed in article 21 did not apply. When article 21, paragraph 3, stated that the provisions to which the reservation related did not apply as between the objecting State and the reserving State to the extent of the reservation, it was referring to reservations permitted under article 19. It would be unreasonable to apply the same rule to reservations incompatible with the object and purpose of a treaty. Instead, such a reservation should be considered invalid and without legal effect.[859]

(20) Moreover, the irrelevance of the Vienna rules is clearly confirmed by the great majority of States' reactions to reservations that they consider invalid. Whether or not they state explicitly that their objection will not preclude the entry into force of the treaty with the author of the reservation, they nevertheless state unambiguously that an impermissible reservation has no legal effect.

(21) The objections made many years ago by the United States of America and the United Kingdom to some of the reservations formulated by Eastern European States to the 1949 Geneva Conventions is a significant example.[860]

(22) Belarus, Bulgaria, Russia and Czechoslovakia also made objections to the Philippines' "interpretative declaration" to the United Nations Convention on the Law of the Sea, stating that this reservation had no value or legal effect.[861] Norway and Finland made objections to a declaration made by the German Democratic Republic in respect of

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as not being a party to the treaty, or *as a party to the treaty but the provision to which the reservation has been made would not apply*, or as a party to the treaty without the benefit of the reservation" (HRI/MC/2006/5/Rev.1, para. 16, recommendation No. 7, emphasis added). This position was, however, subsequently modified (see footnote 859 below).

[856] See above, commentary to guideline 4.3.5 (Effects of an objection on treaty relations).

[857] See the United Kingdom's observations on general comment No. 24 of the Human Rights Committee (*Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (A/50/40), pp. 162–163, para. 13). See also the Sub-Commission on the Promotion and Protection of Human Rights expanded working paper by Ms. Françoise Hampson on the question of reservations to human rights treaties, prepared in accordance with Sub-Commission decision 2001/17 (E/CNOTE4/Sub.2/2003/WP.2), para. 16.

[858] See above, introductory commentary to section 4.5, paras. (5) to (13).

[859] A/C.6/60/SR.14, para. 22. See also Malaysia (A/C.6/60/SR.18, para. 86) and Greece (A/C.6/60/SR.19, para. 39), as well as the report of the meeting of the working group on reservations to the 19th meeting of chairpersons of the human rights treaty bodies and the sixth inter-committee meeting of the human rights treaty bodies (HRI/MC/2007/5, para. 18): "It cannot be envisaged that the reserving State remains a party to the treaty with the provision to which the reservation has been made not applying."

[860] See above, paras. (9) and (10) of the commentary to this guideline.

[861] *Multilateral Treaties* ..., footnote 341 above, chap. XXI.6.

the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[862] the declaration was broadly criticized by several States, which considered that "any such declaration is without legal effect, and cannot in any manner diminish the obligation of a government to contribute to the costs of the Committee in conformity with the provisions of the Convention".[863] And although Portugal had expressed doubt regarding the nullity of an impermissible reservation, it stressed in its objection to the Maldives' reservation to the Convention on the Elimination of All Forms of Discrimination against Women:

> Furthermore, the Government of Portugal considers that these reservations cannot alter or modify in any respect the obligations arising from the Convention for any State party thereto.[864]

(23) State practice is extensive — and essentially homogeneous — and is not limited to a few specific States. Recent objections by Finland,[865] Sweden;[866] other States, such as Belgium,[867] Spain,[868] the Netherlands,[869] the Czech Republic[870] and Slovakia;[871] and even

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[862] See footnote 844 above.

[863] *Multilateral Treaties* ..., footnote 341 above, chap. IV.9.

[864] *Ibid.*, chap. IV.8.

[865] See Finland's objections to the reservation to the International Convention on the Elimination of All Forms of Racial Discrimination made by Yemen (*ibid.*, chap. IV.2); the reservations to the Convention on the Elimination of All Forms of Discrimination against Women made by Kuwait, Malaysia, Lesotho, Singapore and Pakistan (*ibid.*, chap. IV.8); the reservations to the Convention on the Rights of the Child made by Malaysia, Qatar, Singapore and Oman (*ibid.*, chap. IV.11); and the reservation formulated by the United States of America upon consenting to be bound by Protocol III to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (*ibid.*, chap. XXVI.2).

[866] See Sweden's objection to the reservation formulated by the United States of America upon consenting to be bound by Protocol III to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (*ibid.*, chap. XXVI.2). Sweden specified, however, that "this objection shall not preclude the entry into force of the Convention between the United States of America and Sweden. The Convention enters into force in its entirety between the United States of America and Sweden, without the United States of America benefiting from its reservation".

[867] See Belgium's objection to the reservation to the Convention on the Rights of the Child made by Singapore: "The Government considers that paragraph 2 of the declarations, concerning articles 19 and 37 of the Convention and paragraph 3 of the reservations, concerning the constitutional limits upon the acceptance of the obligations contained in the Convention, are contrary to the purposes of the Convention and are consequently without effect under international law" (*ibid.*, chap. IV.9).

[868] See Spain's objection to the reservation to the Convention on the Elimination of All Forms of Discrimination against Women made by Qatar: "The Government of the Kingdom of Spain believes that the aforementioned declarations ... have no legal force and in no way exclude or modify the obligations assumed by Qatar under the Convention" (*ibid.*, chap. IV.8).

[869] See the Netherlands' objection to the reservation to the Convention on the Rights of Persons with Disabilities made by El Salvador: "It is the understanding of the Government of the Kingdom of the Netherlands that the reservation of the Government of the Republic of El Salvador does not exclude or modify the legal effect of the provisions of the Convention in their application to the Republic of El Salvador" (*ibid.*, chap. IV.15).

[870] See the Czech Republic's objection to the reservation to the Convention on the Elimination of All Forms of Discrimination against Women made by Qatar: "[t]he Czech Republic, therefore, objects to the aforesaid reservations made by the State of Qatar to the Convention. This objection shall not preclude the entry into force of the Convention between the Czech Republic and the State of Qatar. The Convention enters into force in its entirety between the Czech Republic and the State of Qatar, without the State of Qatar benefiting from its reservation" (*ibid.*, chap. IV.8).

some international organizations[872] quite often include a statement that the impermissible reservation is devoid of legal force. And it is highly revealing that in principle, this practice of making objections with "super-maximum" effect[873] elicits no opposition of principle from other contracting States or contracting organizations — including the authors of the reservations in question.

(24) The absence of any legal effect as a direct consequence of the nullity of an impermissible reservation — which, moreover, arises directly from the very concept of nullity[874] — was also affirmed by the Human Rights Committee in its general comment No. 24 on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant. The Committee considered that one aspect of the "normal consequence" of the impermissibility of a reservation was that its author did not have the benefit of the reservation.[875] It is significant that, despite the active response to general comment No. 24 by the United States of America, France and the United Kingdom, none of the three States challenged this position.[876]

(25) The Committee subsequently confirmed this conclusion from its general comment No. 24 during its consideration of the *Rawle Kennedy v. Trinidad and Tobago*

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[871] See Slovakia's objection to the reservation to the International Covenant on Economic, Social and Cultural Rights made by Pakistan: "The International Covenant on Economic, Social and Cultural Rights enters into force in its entirety between the Slovak Republic and the Islamic Republic of Pakistan, without ... Pakistan benefiting from its reservation" (*ibid.*, chap. IV.3); and to the reservation to the Convention on the Elimination of All Forms of Discrimination against Women made by Qatar: "This objection shall not preclude the entry into force of the Convention on the Elimination of All Forms of Discrimination Against Women between the Slovak Republic and the State of Qatar. The Convention (...) enters into force in its entirety between the Slovak Republic and the State of Qatar, without the State of Qatar benefiting from its reservations and declarations" (*ibid.*).

[872] See the objections made jointly by the European Community and its members (Belgium, Denmark, the Federal Republic of Germany, France, Ireland, Italy, Luxembourg, the Netherlands and the United Kingdom) to the objections to the Customs Convention on the International Transport of Goods under Cover of TIR Carnets made by Bulgaria and the German Democratic Republic. In the two identical objections, the authors noted: "The statement made (...) concerning article 52 (3) has the appearance of a reservation to that provision, although such reservation is expressly prohibited by the Convention. The Community and the Member States therefore consider that under no circumstances can this statement be invoked against them and they regard it as entirely void" (*ibid.*, chap. XI.A.16).

[873] See the commentary to guideline 4.3.7, paras. (1) to (4), and the eighth report on reservations to treaties (2003), (A/CN.4/535/Add.1), para. 96. See also Bruno Simma, footnote 818 above, pp. 667–668.

[874] See para. (5) of the commentary to guideline 4.5.1 above.

[875] Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/40), vol. I, pp. 151–152, para. 18. See also Françoise Hampson's final working paper on reservations to human rights treaties (E/CN.4/Sub.2/2004/42), para. 57 ("A monitoring body cannot be expected to give effect to a reservation it has found to be incompatible with the objects and purposes of the treaty") and para. 59 of her expanded working paper on the same topic (see footnote 857 above): "A monitoring body cannot be expected to give effect to a reservation it has found to be incompatible with the objects and purposes of the treaty". The Human Rights Committee combined in a single statement the idea that an incompatible reservation cannot produce effects (which is not contested) and the question of the effect of that incompatibility on the author's status as a party (which has been widely debated; see commentary to guideline 4.5.2 [4.5.3] below).

[876] See the observations of the United States of America (*Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/40)), vol. I, annex VI, pp. 154–158; the United Kingdom (*ibid.*, pp. 158–164) and France (*Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/40)), vol. I, annex VI, pp. 104–106.

communication. In its decision on the admissibility of the communication,[877] the Committee ruled on the permissibility of the reservation formulated by the State party on 26 May 1998 upon acceding again to the First Optional Protocol to the International Covenant on Civil and Political Rights, after having denounced the Optional Protocol on the same day. Through its reservation, Trinidad and Tobago sought to exclude the Committee's jurisdiction in cases involving prisoners under sentence of death.[878] On the basis of the discriminatory nature of the reservation, the Committee considered that the reservation "cannot be deemed compatible with the object and purpose of the Optional Protocol".[879] The Committee concluded,

> "The consequence is that the Committee is not precluded from considering the present communication under the Optional Protocol."[880]

In other words, according to the Committee, Trinidad and Tobago's reservation did not exclude application of the Optional Protocol in respect of the applicant, who was a prisoner under sentence of death. It therefore produced neither the legal effect of an established reservation,[881] nor that of a valid reservation to which an objection has been made.[882] It produced no effect.

(26) The Inter-American Court of Human Rights has also stated that an impermissible reservation seeking to limit the Court's jurisdiction could produce no effect. In *Hilaire v. Trinidad and Tobago*, the Court stressed:

> Trinidad and Tobago cannot prevail in the limitation included in its instrument of acceptance of the optional clause of the mandatory jurisdiction of the Inter-American Court of Human Rights in virtue of what has been established in Article 62 of the American Convention, because this limitation is incompatible with the object and purpose of the Convention.[883]

(27) The European Court of Human Rights took this approach in the principle invoked in *Weber v. Switzerland*,[884] *Belilos v. Switzerland*[885] and *Loizidou v. Turkey*.[886] In all three cases, the Court, after noting the impermissibility of the reservations formulated by Switzerland and Turkey, applied the European Convention on Human Rights as if the reservations had not been formulated and, consequently, had produced no legal effect.

(28) In light of this general agreement, the Commission considers that the principle that an invalid reservation has no legal effect is part of positive law. This principle is set out in the second part of guideline 4.5.1.

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[877] Communication No. 845/1999, decision of 2 November 1999 (CCPR/C/67/D/845/1999).

[878] Also in accordance with its conclusions in general comment No. 24, the Committee maintained that the State party remained bound by the Optional Protocol; this cannot be taken for granted, even if it is agreed that Trinidad and Tobago was able to withdraw from the treaty and immediately reaccede to it (a point on which the Special Rapporteur will not, at this time, take a position).

[879] *Ibid.*, para. 6.7.

[880] *Ibid.*

[881] See the guidelines in section 4.2 of the Guide to Practice.

[882] See the guidelines in section 4.3 of the Guide to Practice.

[883] Preliminary objection, judgment of 1 September 2001, *Hilaire v. Trinidad and Tobago*, Series C, No. 80, para. 98. See also the Court's judgment of 1 September 2001 on the preliminary objection in *Benjamin et al. v. Trinidad and Tobago*, Series C, No. 81, para. 89. In the latter judgment, the Court arrived at the same conclusions without, however, stating that the reservation was incompatible with the object and purpose of the Convention.

[884] *Weber v. Switzerland*, 22 May 1990, Series A, No. 177, paras. 36–38.

[885] *Belilos v. Switzerland*, 29 April 1988, Series A, No. 132, para. 60.

[886] *Loizidou v. Turkey*, 23 March 1995, Series A, No. 310, paras. 89–98.

(29) According to one, isolated view expressed within the Commission, the principle is laid out in too rigid a fashion: a reservation would be totally deprived of effects only if it was held impermissible by a decision binding on all the parties to the treaty. Absent such a mechanism, it was for each State to decide for itself, and the nullity of a reservation would be revealed only in relation to States that considered it null and void. It was obviously correct (and inherent in the international legal system) that as long as an impartial third party with decision-making authority had not taken a position on the matter, the question of the validity of a reservation remained an open one (this, in fact, is what makes the reservations dialogue something of interest). However, the Commission considers that this position inevitably entails a generalized relativism that should not be encouraged: the substance of the applicable law (which the Guide to Practice endeavours to enunciate) must not be confused with the settlement of disputes that arise when it is put into effect. A reservation is or is not valid, irrespective of the individual positions taken by States or international organizations in this connection and, accordingly, its nullity is not a subjective question or a relative matter, but can and must be determined objectively, although this does not mean that the reactions of other parties are devoid of interest – but this is the subject of the guidelines in section 4.3 of the Guide to Practice.

4.5.2 [4.5.3] Status of the author of an invalid reservation in relation to the treaty

When an invalid reservation has been formulated, the reserving State or the reserving international organization is considered a contracting State or a contracting organization or, as the case may be, a party to the treaty without the benefit of the reservation, unless a contrary intention of the said State or organization can be identified.

The intention of the author of the reservation shall be identified by taking into consideration all factors that may be relevant to that end, including:

- The wording of the reservation
- Statements made by the author of the reservation when negotiating, signing or ratifying the treaty, or otherwise expressing its consent to be bound by the treaty
- Subsequent conduct of the author of the reservation
- Reactions of other contracting States and contracting organizations
- The provision or provisions to which the reservation relates
- The object and purpose of the treaty

Commentary

(1) Guideline 4.5.1 does not resolve all the issues concerning the effects of the nullity of an impermissible reservation. While it is established that such a reservation cannot produce legal effects, it is essential to answer the question of whether its author becomes a contracting party without the benefit of its reservation, or whether the nullity of its reservation also affects its consent to be bound by the treaty. Both approaches are consistent with the principle that the reservation has no legal effect: either the treaty enters into force for the author of the reservation without the latter benefiting from its invalid reservation, which thus does not have the intended effects; or the treaty does not enter into force for the author of the reservation and, obviously, the reservation also does not produce effects since no treaty relations exist.[887] Guideline 4.5.2 proposes the principle of a middle solution

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[887] See D.W. Greig, footnote 353 above, p. 52; and Ryan Goodman, "Human Rights Treaties, Invalid Reservations, and State Consent", *American Journal of International Law*, vol. 96 (2006), p. 531.

between these apparently irreconcilable positions, based on the (simple – "rebuttable") presumption that the author of the reservation is bound by the treaty without being able to claim the benefit of the reservation, unless the author has expressed the opposite intention.

(2) The first alternative, the severability of an impermissible reservation from the reserving State's consent to be bound by the treaty, is currently supported to some extent by State practice. Many objections have clearly been based on the invalidity of a reservation and even, in many cases, have declared such a reservation to be null and void, and unable to produce effects; nevertheless, in virtually all cases, the objecting States have not opposed the treaty's entry into force and have even declared themselves to be in favour of the establishment of a treaty relationship with the author of the reservation. Since a reservation that is null and void has no legal effect, such a treaty relationship can only mean that the reserving State is bound by the treaty as a whole without benefit of the reservation.

(3) This approach is confirmed by the practice, followed, *inter alia*, by the Nordic States,[888] of formulating what have come to be called objections with "super-maximum" effect (or intent),[889] along the lines of Sweden's objection to the reservation to the Convention on the Rights of Persons with Disabilities formulated by El Salvador:

> The Government of Sweden therefore objects to the aforesaid reservation made by the Government of the Republic of El Salvador to the Convention on the Rights of Persons with Disabilities and considers the reservation null and void. This objection shall not preclude the entry into force of the Convention between El Salvador and Sweden. The Convention enters into force in its entirety between El Salvador and Sweden, without El Salvador benefiting from its reservation.[890]

(4) Such objections, of which the Nordic States — though not the originators of this practice[891] — make frequent use, have been appearing for some 15 years and are used more and more often, especially by the European States. Apart from Sweden, Austria,[892] the Czech Republic[893] and the Netherlands[894] have also sought to give super-maximum effect to their objections to the reservations of El Salvador and Thailand to the 2006 Convention on the Rights of Persons with Disabilities.

(5) More recently, in early 2010, several European States objected to the reservation formulated by the United States of America when expressing its consent to be bound by Protocol III to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. No fewer than five of these objections contain wording intended to

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[888] Concerning this practice, see, *inter alia*, Klabbers (footnote 660 above), pp. 183–186.

[889] See footnote 873 above.

[890] *Multilateral Treaties* ..., footnote 341 above, chap. IV.15. See also Sweden's objection to the reservation to the same Convention formulated by Thailand (*ibid.*).

[891] One of the earliest objections that, while not explicit in this regard, can be termed an objection with "super-maximum" effect was made by Portugal in response to the reservation to the Convention on the Elimination of All Forms of Discrimination against Women made by the Maldives (footnote 864 above).

[892] *Multilateral Treaties* ..., footnote 341 above, chap. IV.15. In its objection, the Austrian Government stressed that "[t]his objection, however, does not preclude the entry into force, *in its entirety*, of the Convention between Austria and El Salvador" (emphasis added).

[893] *Ibid.*

[894] *Ibid.* (chap. IV.15). The Government of the Netherlands explained that "it is the understanding of the Government of the Kingdom of the Netherlands that the reservation of the Government of the Republic of El Salvador does not exclude or modify the legal effect of the provisions of the Convention in their application to the Republic of El Salvador".

produce so-called "super-maximum" effect.[895] Likewise, Austria, the Czech Republic, Estonia, Latvia, Norway, Romania, Slovakia and Spain included in their objections to Qatar's reservation to the Convention on the Elimination of All Forms of Discrimination against Women the proviso that those objections did not preclude the entry into force of the Convention as between those States and the reserving State, without the latter benefiting from the reservation.[896] This largely European practice is undoubtedly influenced by the 1999 recommendation of the Council of Europe on responses to inadmissible reservations to international treaties, which includes a number of model response clauses for use by member States;[897] the above-mentioned objections closely mirror these clauses.

(6) It is clear that this practice is supported to some extent by the decisions of human rights bodies and regional courts, such as the European and Inter-American Courts of Human Rights.

(7) In its landmark judgment in *Belilos v. Switzerland*,[898] the European Court of Human Rights, sitting in plenary session, not only recharacterized the interpretative declaration formulated by the Swiss Government, but also had to decide whether the reservation (incorrectly characterized as an interpretative declaration) was valid. Having concluded that Switzerland's reservation was invalid, particularly in relation to the conditions set out in article 64[899] of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), the Court added:

> "At the same time, it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration."[900]

In its judgment in *Weber v. Switzerland*,[901] a chamber of the Court was called upon to decide whether article 6, paragraph 1, of the Convention was applicable, whether it had been violated by the respondent State and whether Switzerland's reservation in respect of that provision — which, according to the respondent State, was separate from its interpretative declaration — was applicable. In this connection, the Swiss Government claimed that "Switzerland's reservation in respect of Article 6 § 1 (art. 6-1) (...) would in any case prevent Mr. Weber from relying on non-compliance with the principle that proceedings before cantonal courts and judges should be public."[902] The Court went on to consider the validity of Switzerland's reservation and, more specifically, whether it satisfied the requirements of article 64 of the Convention. It noted that the reservation:

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[895] *Ibid.* (chap. XXVI.2): Austria ("the Government of Austria objects to the aforementioned reservation made by the United States of America to the Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects (Protocol III). This position however does not preclude the entry into force in its entirety of the Convention between the United States of America and Austria"); Cyprus ("the Government of the Republic of Cyprus objects to the aforementioned reservation by the United States of America to Protocol III of the CCW. This position does not preclude the entry into force of the Convention between the United States of America and the Republic of Cyprus in its entirety"); Norway ("The Government of the Kingdom of Norway objects to the aforesaid reservation by the Government of the United States of America to the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) to the United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. However, this objection shall not preclude the entry into force of the Protocol in its entirety between the two States, without the United States of America benefiting from its reservation"); and Sweden ("The Government of Sweden objects to the aforesaid reservation made by the Government of the United States of America to Protocol III to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects and considers the reservation without legal effect. This objection shall not preclude the entry into force of the Convention between the United States of America and Sweden. The Convention enters into force in its entirety between the United States of America and Sweden, without the United States of America benefiting from its reservation").

[896] *Multilateral Treaties* ..., footnote 341 above, chap. IV.8.

[897] Council of Europe, Committee of Ministers, recommendation No. R(99)13, 18 May 1999.

[898] Application No. 10328/83, judgment of 29 April 1988, Series A, No. 132.

[899] Now article 57.

[900] Application No. 10328/83, para. 60.

[901] Application No. 11034/84, judgment of 22 May 1990, Series A, No. 177.

> does not fulfil one of them, as the Swiss Government did not append "a brief statement of the law — or laws — concerned" to it. The requirement of paragraph 2 of Article 64 (art. 64-2), however, "both constitutes an evidential factor and contributes to legal certainty"; its purpose is to "provide a guarantee — in particular for the other Contracting Parties and the Convention institutions — that a reservation does not go beyond the provisions expressly excluded by the State concerned" (see the *Belilos* judgment previously cited, Series A No. 132, pp. 27–28, § 59). Disregarding it is a breach not of "a purely formal requirement" but of "a condition of substance" (*ibid.*). The material reservation by Switzerland must accordingly be regarded as invalid.[903]

In contrast to its practice in the *Belilos* judgment, the Court did not go on to explore whether the reservation's nullity had consequences for Switzerland's consent to be bound by the Convention. It simply confined itself to considering whether article 6, paragraph 1, of the Convention had in fact been violated, and concluded that "there ha[d] therefore been a breach of Article 6 § 1 (art. 6-1)".[904] Thus, without saying so explicitly, the Court considered that Switzerland remained bound by the European Convention, despite the nullity of its reservation, and that it could not benefit from the reservation; that being the case, article 6, paragraph 1, was enforceable against it.

(8) In its judgment on preliminary objections in *Loizidou v. Turkey*,[905] a chamber of the European Court took the opportunity to supplement and considerably clarify its jurisprudence. While in this case the issue of validity arose in respect not of a reservation to a provision of the Convention, but of a "reservation" to the optional declaration whereby Turkey recognized the compulsory jurisdiction of the Court pursuant to articles 25 and 46 of the Convention, the lessons of the judgment can easily be transposed to the problem of reservations. Having found that the restrictions *ratione loci* attached to Turkey's declarations of acceptance of the Court's jurisdiction were "invalid", the Strasbourg judges pursued their line of reasoning by considering "whether, as a consequence of this finding, the validity of the acceptances themselves may be called into question".[906] The Court noted:

> 93. In addressing this issue the Court must bear in mind the special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings and its mission, as set out in Article 19 (art. 19), "to ensure the observance of the engagements undertaken by the High Contracting Parties".
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> 94. It also recalls the finding in its *Belilos v. Switzerland* judgment of 29 April 1988, after having struck down an interpretative declaration on the grounds that it did not conform to Article 64 (art. 64), that Switzerland was still bound by the

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[902] *Ibid.*, para. 36.

[903] *Ibid.*, para. 38.

[904] *Ibid.*, para. 40.

[905] Application No. 15318/89, judgment of 23 March 1995, Series A, No. 310.

[906] *Ibid.*, para. 89.

Convention notwithstanding the invalidity of the declaration (Series A No. 132, p. 28, para. 60).

95. The Court does not consider that the issue of the severability of the invalid parts of Turkey's declarations can be decided by reference to the statements of her representatives expressed subsequent to the filing of the declarations either (as regards the declaration under Article 25) (art. 25) before the Committee of Ministers and the Commission or (as regards both Articles 25 and 46) (art. 25, art. 46) in the hearing before the Court. In this connection, it observes that the respondent Government must have been aware, in view of the consistent practice of Contracting Parties under Articles 25 and 46 (art. 25, art. 46) to accept unconditionally the competence of the Commission and Court, that the impugned restrictive clauses were of questionable validity under the Convention system and might be deemed impermissible by the Convention organs. It is of relevance to note, in this context, that the Commission had already expressed the opinion to the Court in its pleadings in the *Belgian Linguistic* (Preliminary objection) and *Kjeldsen, Busk Madsen and Pedersen v. Denmark* cases (judgments of 9 February 1967 and 7 December 1976, Series A Nos. 5 and 23 respectively) that Article 46 (art. 46) did not permit any restrictions in respect of recognition of the Court's jurisdiction (see respectively, the second memorial of the Commission of 14 July 1966, Series B No. 3, vol. I, p. 432, and the memorial of the Commission (Preliminary objection) of 26 January 1976, Series B no. 21, p. 119). The subsequent reaction of various Contracting Parties to the Turkish declarations (…) lends convincing support to the above observation concerning Turkey's awareness of the legal position. That she, against this background, subsequently filed declarations under both Articles 25 and 46 (art. 25, art. 46) — the latter subsequent to the statements by the Contracting Parties referred to above — indicates a willingness on her part to run the risk that the limitation clauses at issue would be declared invalid by the Convention institutions without affecting the validity of the declarations themselves. Seen in this light, the *ex post facto* statements by Turkish representatives cannot be relied upon to detract from the respondent Government's basic — albeit qualified — intention to accept the competence of the Commission and Court.

96. It thus falls to the Court, in the exercise of its responsibilities under Article 19 (art. 19), to decide this issue with reference to the texts of the respective declarations and the special character of the Convention regime. The latter, it must be said, militates in favour of the severance of the impugned clauses since it is by this technique that the rights and freedoms set out in the Convention may be ensured in all areas falling within Turkey's "jurisdiction" within the meaning of Article 1 (art. 1) of the Convention.

97. The Court has examined the text of the declarations and the wording of the restrictions with a view to determining whether the impugned restrictions can be severed from the instruments of acceptance or whether they form an integral and inseparable part of them. Even considering the texts of the Articles 25 and 46 (art. 25, art. 46) declarations taken together, it considers that the impugned restrictions can be separated from the remainder of the text leaving intact the acceptance of the optional clauses.

> 98. It follows that the declarations of 28 January 1987 and 22 January 1990 under Articles 25 and 46 (art. 25, art. 46) contain valid acceptances of the competence of the Commission and Court.[907]

(9) In its judgment on preliminary objections in *Hilaire v. Trinidad and Tobago*,[908] the Inter-American Court of Human Rights likewise noted that, in light of the object and purpose of the American Convention on Human Rights, Trinidad and Tobago could not benefit from the limitation included in its instrument of acceptance of the Court's jurisdiction but was still bound by its acceptance of that compulsory jurisdiction.[909]

(10) With the individual communication, *Rawle Kennedy v. Trinidad and Tobago*, a comparable problem concerning a reservation formulated by the State party upon reacceding to the First Optional Protocol to the International Covenant on Civil and Political Rights was brought before the Human Rights Committee. Having found the reservation thus formulated to be impermissible by reason of its discriminatory nature, the Committee merely noted, "The consequence is that the Committee is not precluded from considering the present communication under the Optional Protocol".[910] In other words, Trinidad and Tobago remained bound by the Protocol without benefit of the reservation.

(11) This decision of the Human Rights Committee is consistent with its conclusions in general comment No. 24 on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant,[911] in which the Committee affirmed that:

> The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.[912]

(12) It should be noted that the wording adopted by the Committee does not suggest that this "normal" consequence is the only one possible or that other solutions may not exist.

(13) On the other hand, in its observations on the Human Rights Committee's general comment No. 24, France stated categorically

> that agreements, whatever their nature, are governed by the law of treaties, that they are based on States' consent and that reservations are conditions which States attach to that consent; it necessarily follows that if these reservations are deemed incompatible with the purpose and object of the treaty, the only course open is to declare that this consent is not valid and decide that these States cannot be considered parties to the instrument in question.[913]

(14) This view, which reflects the opposite answer to the question of whether the author of an impermissible reservation becomes a contracting party, is based on the principle that the nullity of the reservation affects the whole of the instrument of consent to be bound by

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[907] *Ibid.*, paras. 93–98.

[908] Judgment of 1 September 2001, Series C, No. 80.

[909] *Ibid.*, para. 98.

[910] Communication No. 845/1999, decision of 2 November 1999 (CCPR/C/67/D/845/1999), para. 6.7. See also para. (25) of the commentary to guideline 4.5.1 above.

[911] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (A/50/40), vol. I, annex V, pp. 119–125.

[912] *Ibid.*, p. 124, para. 18.

[913] Report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40* (A/51/40), vol. I, p. 106, para. 13.

the treaty. In a 1951 advisory opinion, the International Court of Justice answered, in response to the General Assembly's question I,

> that a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; *otherwise, that State cannot be regarded as being a party to the Convention.*[914]

(15) According to this approach, the reservation is seen as a *sine qua non* for the reserving State's consent to be bound by the treaty, which alone would be in conformity with the principle of consent. If the condition is not valid, there is no consent on the part of the reserving State. In these circumstances, only the reserving State can take the necessary decisions to remedy the nullity of its reservation, and it should not be regarded as a party to the treaty until such time as it has withdrawn or amended its reservation.

(16) The practice of the Secretary-General as depositary of multilateral treaties also seems to confirm this radical solution. The *Summary of Practice* explains in this respect:

> 191. If the treaty forbids any reservation, the Secretary-General will refuse to accept the deposit of the instrument. The Secretary-General will call the attention of the State concerned to the difficulty and shall not issue any notification concerning the instrument to any other State concerned (...).
>
> 192. If the prohibition is to only specific articles, or conversely reservations are authorized only in respect of specific provisions, the Secretary-General shall act, *mutatis mutandis*, in a similar fashion if the reservations are not in keeping with the relevant provisions of the treaty (...).
>
> 193. However, only if there is *prima facie* no doubt that the statement accompanying the instrument is an unauthorized reservation does the Secretary-General refuse the deposit. Such would evidently be the case if the statement, for example, read "State XXX shall not apply article YYY", when the treaty prohibited all reservations or reservations to article YYY.[915]

(17) State practice, while not completely absent, is still less consistent in this regard. For example, Israel, Italy and the United Kingdom objected to the reservation formulated by Burundi upon acceding to the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. But whereas these three States regard the reservation entered by the Government of Burundi as incompatible with the object and purpose of the Convention and are unable to consider Burundi as having validly acceded to the Convention until such time as the reservation is withdrawn,[916] two other States (Federal Republic of Germany and France) that objected to Burundi's reservation did not include such a statement in their objections.[917]

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[914] *I.C.J. Reports 1951* (see footnote 305 above), p. 29 (emphasis added).

[915] *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* (ST/LEG/7/Rev.1), p. 57, paras. 191–193. Concerning such a distinction see, however, guideline 3.3 (Consequences of the non-permissibility of a reservation) and the commentary thereto (*Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), pp. 302308).

[916] *Multilateral Treaties* ..., footnote 341 above, chap. XVIII.7, available from http://treaties.un.org.

[917] The Federal Republic of Germany objected: "The Government of the Federal Republic of Germany considers the reservation made by the Government of Burundi concerning article 2, paragraph 2, and article 6, paragraph 1, of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, to be incompatible with the object and purpose of the Convention" (*ibid.*). The Government of France, upon acceding to the Convention,

(18) The Government of the Republic of China, which ratified the Convention on the Prevention and Punishment of the Crime of Genocide in 1951,[918] stated that it

> ... objects to all the identical reservations made at the time of signature or ratification or accession to the Convention by Bulgaria, Byelorussian Soviet Socialist Republic, Czechoslovakia, Hungary, Poland, Romania, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics. The Chinese Government considers the above-mentioned reservations as incompatible with the object and purpose of the Convention and, therefore, by virtue of the Advisory Opinion of the International Court of Justice of 28 May 1951, would not regard the above-mentioned States as being Parties to the Convention.[919]

In spite of the large number of similar reservations, only the Government of the Netherlands formulated a comparable objection, in 1966.[920]

(19) In the vast majority of cases, States that formulate objections to a reservation that they consider invalid expressly state that their objection does not preclude the entry into force of the treaty in their relations with the reserving State, while seeing no need to elaborate further on the content of any such treaty relationship. The International Law Commission in 2005 sought comments from Member States on the following question:

> States often object to a reservation that they consider incompatible with the object and purpose of the treaty, but without opposing the entry into force of the treaty between themselves and the author of the reservation. The Commission would be particularly interested in Governments' comments on this practice. It would like to know, in particular, what effects the authors expect such objections to have, and how, in Governments' view, this practice accords with article 19 (c) of the 1969 Vienna Convention on the Law of Treaties.[921]

The views expressed by several delegations in the Sixth Committee clearly show that there is no agreement on the approach to the thorny question of the validity of consent to be bound by the treaty in the case of an invalid reservation. Several States[922] have maintained that this practice was "paradoxical" and that, in any event, the author of the objection

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stated that it "objects to the declaration made by Burundi on 17 December 1980 limiting the application of the provisions of article 2, paragraph 2, and article 6, paragraph 1" (*ibid.*).

[918] This notification was made prior to the adoption, on 25 October 1971, of General Assembly resolution 2758 (XXVI), whereby the Assembly decided "to restore all its rights to the People's Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations"; the Government of the People's Republic of China declared, upon ratifying the 1948 Genocide Convention on 18 April 1983, that "The ratification to the said Convention by the Taiwan local authorities on 19 July 1951 in the name of China is illegal and therefore null and void" (*ibid.*, chap. IV.1).

[919] *Ibid.*

[920] The objection by the Netherlands reads: "The Government of the Kingdom of the Netherlands declares that it considers the reservations made by Albania, Algeria, Bulgaria, the Byelorussian Soviet Socialist Republic, Czechoslovakia, Hungary, India, Morocco, Poland, Romania, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics in respect of article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature at Paris on 9 December 1948, to be incompatible with the object and purpose of the Convention. The Government of the Kingdom of the Netherlands therefore does not deem any State which has made or which will make such reservation a party to the Convention" (*ibid.*).

[921] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 29.

[922] See A/C.6/60/SR.14, paras. 3 (United Kingdom) and 72 (France); and A/C.6/60/SR.16, paras. 20 (Italy) and 44 (Portugal).

"could not simply ignore the reservation and act as if it had never been formulated".[923] The French delegation stressed that

> such an objection would create the so-called "super-maximum effect", since it would allow for the application of the treaty as a whole without regard to the fact that a reservation had been entered. That would compromise the basic principle of consensus underlying the law of treaties.[924]

Others, however, noted that it would be better to have the author of the reservation become a contracting State or contracting organization than to exclude it from the circle of parties. In that regard, the representative of Sweden, speaking on behalf of the Nordic countries, said:

> The practice of severing reservations incompatible with the object and purpose of a treaty accorded well with article 19, which made it clear that such reservations were not expected to be included in the treaty relations between States. While one alternative in objecting to impermissible reservations was to exclude bilateral treaty relations altogether, the option of severability secured bilateral treaty relations and opened up possibilities of dialogue within the treaty regime.[925]

(20) However, it should be noted that those who share this point of view have made the entry into force of the treaty conditional on the will of the author of the reservation: "However, account must be taken of the will of the reserving State regarding the relationship between the ratification of a treaty and the reservation."[926].

(21) Although the two approaches and the two points of view concerning the question of the entry into force of the treaty may initially appear diametrically opposed, both are consistent with the principle that underlies treaty law: the principle of consent. There is no doubt that the key to the problem is simply the will of the author of the reservation: does the author purport to be bound by the treaty even if its reservation is invalid — without benefit of the reservation — or is its reservation a *sine qua non* for its commitment to be bound by the treaty?

(22) In the context of the specific but comparable issue of reservations to the optional clause concerning the compulsory jurisdiction of the International Court of Justice in article 36, paragraph 2, of the Statute of the Court, Judge Lauterpacht, in his dissenting opinion to the Court's judgment on the preliminary objections in the *Interhandel* case, stated:

> If that reservation is an essential condition of the Acceptance in the sense that without it the declaring State would have been wholly unwilling to undertake the principal obligation, then it is not open to the Court to disregard that reservation and at the same time to hold the accepting State bound by the Declaration.[927]

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[923] A/C.6/60/SR.14, para. 72 (France).

[924] *Ibid.*

[925] A/C.6/60/SR.14, para. 23 (Sweden). See also A/C.6/60/SR.17, para. 24 (Spain); A/C.6/60/SR.18, para. 86 (Malaysia); and A/C.6/60/SR.19, para. 39 (Greece).

[926] A/C.6/60/SR.14, para. 23 (Sweden). See also the position of the United Kingdom (*ibid.*, para. 4): "On the related issue of the 'super-maximum effect' of an objection, consisting in the determination not only that the reservation objected to was not valid but also that, as a result, the treaty as a whole applied *ipso facto* in the relations between the two States, his delegation considered that that could occur only in the most exceptional circumstances, for example, if the State making the reservation could be said to have accepted or acquiesced in such an effect."

[927] *Interhandel (Switzerland v. United States of America)*, dissenting opinion of Sir Hersch Lauterpacht, *I.C.J. Reports 1959*, p. 117.

Thus, the important issue is the will of the author of the reservation and its intent to be bound by the treaty, with or without benefit of its reservation. This is also true in the case of more classic reservations to treaty provisions.

(23) In its judgment in the *Belilos* case, the European Court of Human Rights paid particular attention to Switzerland's position with regard to the European Convention. It expressly noted: "At the same time, Switzerland was, and regarded itself as, bound by the Convention irrespective of validity of the declaration."[928] Thus, the Court clearly took into consideration the fact that Switzerland itself — the author of the invalid "reservation" — considered itself to be bound by the treaty despite the nullity of this reservation and had behaved accordingly.

(24) In the *Loizidou* case, the European Court of Human Rights also based its judgment, if not on the will of the Turkish Government — which had maintained during the proceedings before the Court that "if the restrictions attached to the Articles 25 and 46 (art. 25, art. 46) declarations were not recognized to be valid, as a whole, the declarations were to be considered null and void in their entirety"[929] — then on the fact that Turkey had knowingly run the risk that the restrictions resulting from its reservation would be declared invalid:

> That she, against this background, subsequently filed declarations under both Articles 25 and 46 (art. 25, art. 46) — the latter subsequent to the statements by the Contracting Parties referred to above — indicates a willingness on her part to run the risk that the limitation clauses at issue would be declared invalid by the Convention institutions without affecting the validity of the declarations themselves.[930]

(25) The "Strasbourg approach"[931] thus consists of acting on the reserving State's will to be bound by the treaty even if its reservation is invalid.[932] In so doing, the Court did not, however, rely only on the express declarations of the State in question — as, for example, it did in the *Belilos* case[933] — it also sought to "reconstruct" the will of the State. As William A. Schabas has written:

> The European Court did not set aside the test of intention in determining whether a reservation is severable. Rather, it appears to highlight the difficulty in identifying

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[928] Judgment cited above, footnote 884.

[929] See footnote 886 above, para. 90.

[930] *Ibid.*, para. 95.

[931] B. Simma, footnote 818 above, p. 670.

[932] See also footnote 859 above. According to G. Gaja, "*Una soluzione alternativa alla quale si può giungere nella ricostruzione della volontà dello Stato autore della riserva è che tale Stato abbia inteso vincolarsi in base al trattato anche nel caso in cui la riserva fosse considerata inammissibile e quindi senza il beneficio della riserva*" [An alternative conclusion that one might reach in analysing the will of the reserving State is that the State in question must have purported to be bound by the treaty even if the reservation was considered inadmissible, i.e., without the benefit of the reservation] (*op. cit.*, footnote 728 above, p. 358).

[933] On this case and its impact, see R. Baratta, footnote 499 above, pp. 160–163; Henry J. Bourguignon, "The Belilos Case: New Light on Reservations to Multilateral Treaties", *Virginia Journal of International Law*, vol. 29 (1989), pp. 347–386; Iain Cameron and Frank Horn, "Reservations to the European Convention on Human Rights: the *Belilos* Case", *German Yearbook of International Law*, vol. 33 (1990), pp. 69–116; Susan Marks, "Reservations unhinged: the Belilos case before the European Court of Human Rights", *International Comparative Law Quarterly*, vol. 39 (1990), pp. 300–327; and Gérard Cohen-Jonathan, "Les réserves à la Convention européenne des droits de l'homme (à propos de l'arrêt Belilos du 29 avril 1988)", *Revue générale de droit international public*, vol. 93 (1989), pp. 272–314.

> such intention and expresses a disregard for such factors as formal declarations by the State [934]

Only if it is established that the reserving State did not consider its reservation (which has been recognized as invalid) to be an essential element of its consent to be bound by the treaty is the reservation separable from its treaty obligation.

(26) Moreover, the European Court of Human Rights and the Inter-American Court of Human Rights do not limit their consideration to the will of the State that is the author of the invalid reservation; both Courts take into account the specific nature of the instruments that they are mandated to enforce. In the *Loizidou* case, for example, the European Court drew attention to the fact that:

> In addressing this issue the Court must bear in mind the special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings and its mission, as set out in Article 19 (art. 19), "to ensure the observance of the engagements undertaken by the High Contracting Parties".[935]

(27) The Inter-American Court, for its part, stressed in its judgment in the *Hilaire v. Trinidad and Tobago* case:

> 93. Moreover, accepting the said declaration in the manner proposed by the State would lead to a situation in which the Court would have the State's Constitution as its first point of reference, and the American Convention only as a subsidiary parameter, a situation which would cause a fragmentation of the international legal order for the protection of human rights, and which would render illusory the object and purpose of the Convention.
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> 94. The American Convention and the other human rights treaties are inspired by a set of higher common values (centred around the protection of the human being), are endowed with specific supervisory mechanisms, are applied as a collective guarantee, embody essentially objective obligations, and have a special character that sets them apart from other treaties ...[936]

(28) The position expressed by the Human Rights Committee in its general comment No. 24 is even more categorical.[937] In fact, the Committee makes no connection between the entry into force of the treaty, despite the nullity of the invalid reservation, and the author's wishes in that regard. It simply states that the "normal consequence"[938] is the entry into force of the treaty for the author of the reservation without benefit of the reservation. However, as noted above,[939] this "normal" consequence, which the Committee apparently views as somewhat automatic, does not exclude (and, conversely, suggests) the possibility that the invalid reservation may produce other "abnormal" consequences. But the

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[934] William A. Schabas, "Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?", *Brooklyn Journal of International Law*, vol. 21 (1995), p. 322.

[935] Footnote 866 above, para. 93.

[936] Judgment of 1 September 2001 (preliminary objections), Series C, No. 80, paras. 93–94.

[937] In her expanded working paper, Hampson states: "A monitoring body cannot be expected to give effect to a reservation it has found to be incompatible with the objects and purposes of the treaty. The result is the application of the treaty without the reservation, whether that is called 'severance' or disguised by the use of some other phrase, such as non-application" (see footnote 857 above, para. 59).

[938] See footnote 876 above.

[939] See above paragraph (11) of the commentary to this guideline.

Committee is silent on both the question of what these other consequences might be, and the question of how and by what the "normal" consequence and the potential "abnormal" consequence are triggered.

(29) In any event, the position taken by the human rights bodies has been noticeably nuanced in recent years. For example, at the fourth inter-committee meeting of the human rights treaty bodies and the seventeenth meeting of chairpersons of these bodies, it was noted:

> In a meeting with ILC on 31 July 2003, HRC confirmed that the Committee continued to endorse general comment No. 24, and several members of the Committee stressed that there was growing support for the severability approach, but that there was no automatic conclusion of severability for inadmissible reservations but only a presumption.[940]

In 2006, the working group on reservations, which was established to examine the practice of human rights treaty bodies, in that regard, noted that there were several potential consequences of a reservation that had been ruled invalid. It ultimately proposed the following recommendation No. 7:

> ... *The consequence that applies in a particular situation depends on the intention of the State at the time it enters its reservation.* This intention must be identified during a serious examination of the available information, with the presumption, which may be refuted, that the State would prefer to remain a party to the treaty without the benefit of the reservation, rather than being excluded.[941]

According to the revised recommendation No. 7 of 2006 submitted by the working group on reservations established to examine the practice of human rights treaty bodies,[942] which the sixth inter-committee meeting of the human rights treaty bodies endorsed[943] in 2007:

> As to the consequences of invalidity, the Working Group agrees with the proposal of the Special Rapporteur of the International Law Commission according to which an invalid reservation is to be considered null and void. It follows that a State will not be able to rely on such a reservation and, *unless its contrary intention is incontrovertibly established*, will remain a party to the treaty without the benefit of the reservation (emphasis added).

(30) The deciding factor is still clearly the intention of the State that is the author of the invalid reservation. Entry into force is no longer simply an automatic consequence of the nullity of a reservation, but rather a presumption. The Commission retained this position in the Guide to Practice since it offers a reasonable compromise between the underlying principle of treaty law — consent — and the potential to consider that the author of the invalid reservation is bound by the treaty without the benefit of the reservation.

(31) The phrase "the reserving State or the reserving international organization is considered a contracting State or contracting organization" was preferred by the Commission over that initially proposed by the Special Rapporteur, which provided that "the treaty applies to the reserving State or to the reserving international organization,

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[940] Report on the practice of the treaty bodies with respect to reservations made to the core international human rights treaties (HRI/MC/2005/5), para. 37.

[941] HRI/MC/2006/5, para. 16 (emphasis added).

[942] See HRI/MC/2007/5, pp. 6–8.

[943] Report of the sixth inter-committee meeting of human rights treaty bodies (A/62/224), Annex, para. 48 (v).

notwithstanding the reservation",[944] in order to indicate clearly that the guideline states a mere presumption and does not have the incontrovertible nature of a rule. The word "unless" has the same function.

(32) There may, however, be doubts as to which way the presumption should be expressed; intellectually, the presumption might just as well be in the sense of an intention that the treaty should enter into force or, the reverse, that the author of the reservation did not intend it to enter into force.

(33) A negative presumption — refusing to consider the author of the reservation to be a contracting State or contracting organization until an intention to the contrary has been established — might, at first glance, appear to reflect better the principle of consent according to which, in the words of the International Court of Justice, "in its treaty relations a State cannot be bound without its consent".[945] From this point of view, a State or international organization that has formulated a reservation — even though it is invalid — has, in fact, expressed its disagreement with the provision or provisions which the reservation purports to modify or the legal effect of which it purports to exclude. In its observations on general comment No. 24, the United Kingdom states that it is "hardly feasible to try to hold a State to obligations under the Covenant which it self-evidently has not 'expressly recognized' but rather has indicated its express unwillingness to accept".[946] From that point of view, no agreement to the contrary can be noted or presumed unless the State or organization in question consents, or at least acquiesces, to be bound by the provision or provisions without benefit of its reservation.

(34) The reverse — positive — presumption has, however, several advantages which, regardless of any consideration of desirability, argue in its favour even though this rule is not established in the Vienna Conventions[947] and is probably not a rule of customary international law.[948] However, the decisions of the human rights courts, the positions taken by the human rights treaty bodies and the increasing body of State practice in this area should not be ignored.

(35) First and foremost, it should be borne in mind that the author of the reservation, by definition, wished to become a contracting party to the treaty in question. The reservation is formulated when the State or international organization expresses its consent to be bound by the treaty, thereby conveying its intention to enter the privileged circle of parties and committing itself to implementation of the treaty. The reservation certainly plays a role in this process; for the purposes of establishing the presumption, however, its importance should not be overestimated.

(36) Furthermore, and perhaps most importantly, it is certainly wiser to presume that the author of the reservation is part of the circle of contracting States or contracting organizations in order to resolve the problems associated with the nullity of its reservation in the context of this privileged circle. In that regard, it must not be forgotten that, as the

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[944] Fifteenth report on reservations to treaties (A/CN.4/624/Add.1), guideline 4.5.3, pp. 39–40.

[945] *I.C.J. Reports 1951* (see footnote 305 above), p. 21.

[946] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (A/50/40), p. 133, para. 14.

[947] As noted above in the introduction to section 4.5 of the Guide to Practice, the Vienna Conventions do not address the issue of invalid reservations; see above, paras. (1) to (18) of the general commentary to section 4.5.

[948] See, *inter alia*, Roberto Baratta, "Should Invalid Reservations to Human Rights Treaties Be Disregarded?", *European Journal of International Law*, vol. 11 (2000), pp. 419–420.

Commission has noted in its preliminary conclusions on reservations to normative multilateral treaties including human rights treaties,[949]

> in the event of inadmissibility of a reservation, it is the reserving State that has the responsibility for taking action. This action may consist, for example, in the State's either modifying its reservation so as to eliminate the inadmissibility, or withdrawing its reservation, or forgoing becoming a party to the treaty.[950]

To that end, as stressed at the fourth inter-committee meeting of the human rights treaty bodies and the seventeenth meeting of chairpersons of these bodies, "human rights treaty bodies" — or any other mechanism established by the treaty or the parties to the treaty as a whole — "should be encouraged to continue their current practice of entering into a dialogue with reserving States, with a view to effecting such changes in the incompatible reservation as to make it compatible with the treaty".[951] Although this point of view was not shared by some members, the Commission considered that this goal may more readily be achieved if the reserving State or reserving international organization is deemed to be a party to the treaty.

(37) Moreover, presuming the entry into force of the treaty provides legal certainty. This presumption (which is rebuttable) can help resolve the uncertainty between the formulation of the reservation and the establishment of its nullity; during this entire period (which may last several years),[952] the author of the reservation has conducted itself as a party and been deemed to be so by the other parties.

(38) In light of these considerations, the majority of the members of the Commission supports the idea of a rebuttable presumption, according to which the treaty would apply to a State or international organization that is the author of an invalid reservation, notwithstanding that reservation, in the absence of a contrary intention on the part of the author. In other words, if this basic condition is met (absence of a contrary intention on the part of the author of the reservation), the treaty is presumed to have entered into force for the author — provided that the treaty has entered into force in respect of the contracting States and contracting organizations — and the reservation has no legal effect on the content of the treaty,[953] which applies in its entirety.

(39) The expression "unless a contrary intention of the said State or organization can be identified", which appears at the end of the first paragraph of guideline 4.5.2, reflects this positive presumption retained by the Commission subject to the intention of the reserving State or reserving international organization. If a contrary intention can be identified, the presumption falls away.[954]

(40) It was proposed to accord even greater weight to the will of the author of the reservation by including in guideline 4.5.2 a provision recommending that additional options be opened for the withdrawal from a treaty in the event that a reservation was found invalid, given that the Vienna Conventions do not contemplate that hypothesis. Although certain members of the Commission supported that proposal, the Commission rejected it. Granted, the Vienna Conventions do not indicate what rules to follow in the case of invalid

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[949] *Yearbook ... 1997*, vol. II, Part Two, pp. 56–57, para. 157.

[950] *Ibid.*, p. 57 (para. 10 of the preliminary conclusions).

[951] HRI/MC/2005/5, para. 42.

[952] In the absence of a pronouncement by a competent organ, that uncertainty may last indefinitely.

[953] See paras. (14) to (17) of the commentary to guideline 4.5.1 above.

[954] In English, the word "identified" was preferred over that of "established", which seemed too rigid to certain members of the Commission. In addition, "established" seemed to reflect a greater degree of clarity than that provided by the non-exhaustive list of elements in the second paragraph.

reservations; but they do lay down precise rules concerning withdrawal from a treaty, and such a formulation (which had no precedent on which it could be based) would exceed the scope of the "law of reservations". It would be difficult to reconcile that proposal with the text of article 42 of the Vienna Conventions, according to which "the withdrawal of a party may take place only as a result of the application of the provisions of the treaty or of the present Convention". Articles 54 and 56 of the Vienna Conventions confirm this point.

(41) In practice, determining the intention of the author of an invalid reservation may be a challenging process. It is not easy to establish what led a State or an international organization to express its consent to be bound by the treaty, on the one hand, and to attach a reservation to that expression of consent, on the other, since "the State alone could know the exact role of its reservation to its consent".[955] Since the basic presumption is rebuttable, however, it is vital to establish whether the author of the reservation would knowingly have ratified the treaty without the reservation or whether, on the contrary, it would have refrained from doing so.

(42) Several factors come into play, which are listed in a non-exhaustive way in paragraph 2.

(43) First, the text of the reservation itself may well contain elements that provide information about its author's intention in the event that the reservation is invalid. At least, that is the case when reasons for the reservation are given as recommended in guideline 2.1.9 of the Guide to Practice.[956] The reasons given for formulating a reservation, in addition to clarifying its meaning, may also make it possible to determine whether the reservation is deemed to be an essential condition for the author's consent to be bound by the treaty. Any declaration made by the author of the reservation upon signing, ratifying or acceding to a treaty or making a notification of its succession thereto may also provide an indication. Any declaration made subsequently, particularly declarations that the author of the reservation may be required to make in the context of judicial proceedings concerning the validity, and the effects of the invalidity, of its reservation, should, however, be treated with caution.[957]

(44) The reactions of other States and international organizations must also be taken into account. Although these reactions obviously cannot, in themselves, produce legal effects by neutralizing the nullity of the reservation, they can facilitate an assessment of the author's intention or, more accurately, the risk that it may intentionally have run in formulating an invalid reservation. This is particularly well illustrated by the European Court of Human Rights in the *Loizidou* case; the Court, citing case law established before Turkey formulated its reservation, as well as the objections made by several States parties to the Convention,[958] concluded that:

> The subsequent reaction of various Contracting Parties to the Turkish declarations ... lends convincing support to the above observation concerning Turkey's awareness of the legal position. That she, against this background, subsequently filed declarations under both Articles 25 and 46 (art. 25, art. 46) — the latter subsequent to the statements by the Contracting Parties referred to above — indicates a willingness on her part to run the risk that the limitation clauses at issue

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[955] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. 83; *Yearbook ... 1997*, vol. II, Part Two, p. 49.

[956] For the commentary to this guideline, see *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), pp. 184–189.

[957] See in this regard *Loizidou v. Turkey*, application No. 15318/89, judgment of 23 March 1995, Series A, No. 310, para. 95.

[958] Application No. 15318/89, judgment of 23 March 1995, Series A, No. 310, paras. 18–24.

> would be declared invalid by the Convention institutions without affecting the validity of the declarations themselves.[959]

(45) In line with the approach taken by the European Court of Human Rights in its judgment in the *Belilos* case,[960] it is also advisable to take into consideration the author's subsequent conduct with respect to the treaty. The representatives of Switzerland, by their actions and their statements before the Court, left no doubt that Switzerland would regard itself as bound by the European Convention even in the event that its interpretative declaration was deemed invalid. Moreover, as Schabas pointed out in relation to the reservations to the 1966 International Covenant on Civil and Political Rights made by the United States of America:

> Certain aspects of the U.S. practice lend weight to the argument that its general intent is to be bound by the Covenant, whatever the outcome of litigation concerning the legality of the reservation. It is useful to recall that Washington fully participated in the drafting of the American Convention whose provisions are very similar to articles 6 and 7 of the Covenant and were in fact inspired by them. ... Although briefly questioning the juvenile death penalty and the exclusion of political crimes, [the U.S. representative] did not object in substance to the provisions dealing with the death penalty or torture. The United States signed the American Convention on June 1, 1977 without reservation.[961]

Although caution is certainly warranted when making comparisons between different treaties owing to the relative effect of any reservation, it is possible to refer to the prior attitude of the reserving State with regard to provisions similar to those to which the reservation relates. If a State consistently and systematically excludes the legal effect of a particular obligation contained in several instruments, such practice could certainly constitute significant proof that the author of the reservation does not wish to be bound by that obligation under any circumstances.

(46) In addition to the actual text of the reservation and the reasons given for its formulation, as well as these circumstantial and contextual elements, the content and context of the provision or provisions of the treaty to which the reservation relates, on the one hand, and the object and purpose of the treaty, on the other, must also be taken into account. As mentioned above, the European Court of Human Rights and the Inter-American Court of Human Rights have paid considerable attention to the "special character" of the treaty in question;[962] there is no reason to limit these considerations to human rights treaties, which do not constitute a specific category of treaty for the purposes of applying rules relating to reservations[963] and are not the only treaties to establish "higher common values". Some members of the Commission, however, considered that the nature of the treaty should have been explicitly included, as an element of the object and purpose,

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[959] *Ibid.*, para. 95.

[960] See paras. (23) to (25) above.

[961] W.A. Schabas, *op. cit.*, footnote 934 above, p. 322 (footnotes omitted).

[962] See para. (27) above.

[963] See the second report on reservations to treaties (A/CN.4/477 and Add.1), paras. 55–260; *Yearbook ... 1996*, vol. II, Part One, pp. 52–83; and the Commission's Preliminary Conclusions on reservations to normative multilateral treaties including human rights treaties (*Yearbook ... 1997*, vol. II, Part Two, para. 157, pp. 56–57). For that reason, the Commission did not, despite a contrary view, expressly mention the nature of the treaty in question as one of the factors listed in the second paragraph of guidelines 4.5.2 to be taken into consideration in identifying the intention of the author of the reservation – especially since it was observed that that criterion was not easy to distinguish from the object and purpose of the treaty.

in the list of factors to be taken into account when determining the intent of the author of the reservation.

(47) The combination of these factors — and of others, where appropriate — should serve as a guide to the authorities required to issue a ruling on the consequences of the nullity of an invalid reservation, given that this list is by no means exhaustive and that all elements that are likely to identify the intention of the author of the reservation must be taken into consideration. A reference to the non-exhaustive nature of this list appears twice in the chapeau of the second paragraph of guideline 4.5.2: in the expression "all factors that may be relevant to that end" and the term "including". In turn, the phrase "to that end" underscores the fact that only factors relevant to identifying the intention of the author of the reservation are to be taken into consideration.

(48) The order in which the various factors are listed reflects the logical order in which they are taken into consideration but has no particular significance with regard to their relative importance; the latter depends on the specific circumstances of each situation. The factors contained in the first four bullet points relate directly to the reservation and to the attitude towards the reservation of the State or international organization concerned; the last two factors, which are more general in nature, relate to the subject of the reservation.

(49) That said, the Commission is of the view that the establishment of such a presumption should not be taken as approval of what are now generally called objections with "super-maximum" effect. Certainly, the result of the presumption may ultimately be the same as the intended result of such objections. But whereas an objection with "super-maximum" effect apparently purports to require that the author of the reservation should be bound by the treaty without the benefit of its reservation simply because the reservation is invalid, the presumption embodied in guideline 4.5.2 is based on the intention of the author of the reservation. Although this intention may be hypothetical if not expressly indicated by the author, it is understood that nothing prevents the author from making its true intention known to the other contracting parties. Thus, the requirement that the treaty must be implemented in its entirety would derive not from a subjective assessment by another contracting party, but solely from the nullity of the reservation and the intention of its author. An objection, whether simple or with "super-maximum" effect, cannot produce such an effect. "No State can be bound by contractual obligations it does not consider suitable",[964] neither the objecting State nor the reserving State, although such considerations clearly do not mean that the practice has no significance.[965]

(50) Draft guideline 4.5.2 intentionally refrains from establishing the date on which the treaty enters into force in such a situation. In most cases, this is subject to specific conditions established in the treaty itself.[966] The specific effects, including the date on which the treaty enters into force for the author of the invalid reservation, are therefore determined by the relevant provisions of the treaty or, failing any such provision, by treaty law[967] in general and are not derived specifically from the rules concerning reservations.

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[964] C. Tomuschat, footnote 321 above, p. 466; see also second report on reservations to treaties (A/CN.4/477/Add.1), paras. 97 and 99; *Yearbook ... 1996*, vol. II, Part One, p. 57; and Daniel Müller, "Article 20 (1969)", in Olivier Corten and Pierre Klein (eds.), footnote 324 above, pp. 809–811, paras. 20–24.

[965] See paras. (20) to (28) of the commentary to guideline 4.5.1 above.

[966] Art. 24, para. 1, of the 1969 Vienna Convention states: "A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree."

[967] See art. 24, paras. 2 and 3, of the 1969 Vienna Convention. These paragraphs state:

> 2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States.

4.5.3 [4.5.4] Reactions to an invalid reservation

The nullity of an invalid reservation does not depend on the objection or the acceptance by a contracting State or a contracting organization.

Nevertheless, a State or an international organization which considers that the reservation is invalid should, if it deems it appropriate, formulate a reasoned objection as soon as possible.

Commentary

(1) The first paragraph of guideline 4.5.3 is essentially a reminder — which it was considered desirable to include in Part 4 of the Guide to Practice — of a fundamental principle embodied in several previous guidelines, according to which the nullity of an invalid reservation depends on the reservation itself and not on the reactions it may elicit. The second paragraph should be seen as a recommendation to States and international organizations that they should not, as a consequence, refrain from objecting to such a reservation, specifying the reasons why they consider the reservation to be invalid.

(2) The first paragraph of draft guideline 4.5.3 is perfectly consistent with guideline 3.1 (which reproduces the text of article 19 of the Vienna Conventions), guideline 3.3.2[968] and guideline 4.5.1.[969] It illustrates what is meant by the term "void" included in draft guideline 4.5.1, by serving as a reminder that the nullity of an invalid reservation is based on objective factors and does not depend on the reaction of a contracting State or contracting organization other than the author of the reservation – in other words, as expressly indicated in the first paragraph, on their acceptance or their objection.

(3) In State practice, the vast majority of objections are based on the invalidity of the reservation to which the objection is made. But the authors of such objections draw very different conclusions from them: some simply note that the reservation is invalid while others state that it is null and void and without legal effect. Sometimes (but very rarely), the author of the objection states that its objection precludes the entry into force of the treaty as between itself and the reserving State; sometimes, on the other hand, it states that the treaty enters into force in its entirety in these same bilateral relations, and sometimes it remains silent on that point.[970]

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3. When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides.

[968] "Acceptance of an impermissible reservation by a contracting State or by a contracting organization shall not cure the nullity of the reservation."

[969] "A reservation that does not meet the conditions of formal validity and permissibility set out in Parts 2 and 3 of the Guide to Practice is null and void, and therefore devoid of legal effect."

[970] The reactions to the reservation formulated by Qatar upon acceding to the Convention on the Elimination of All Forms of Discrimination against Women illustrate virtually the full range of objections imaginable: while the 18 objections (including late ones made by Mexico and Portugal) all note that the reservation is incompatible with the object and purpose of the Convention, one (that of Sweden) adds that it is "null and void", and two others (those of Spain and the Netherlands) point out that the reservation does not produce any effect on the provisions of the Convention. Eight of these objections (those of Belgium, Finland, Hungary, Ireland, Italy, Mexico, Poland and Portugal) specify that the objections do not preclude the entry into force of the treaty, while 10 (those of Austria, the Czech Republic, Estonia, Latvia, the Netherlands, Norway, Romania, Slovakia, Spain and Sweden) consider that the treaty enters into force for Qatar without the reserving State being able to rely on its impermissible reservation. See *Multilateral Treaties* ..., footnote 341 above, chap. IV.8.

(4) The jurisprudence of the International Court of Justice does not appear to be consistent on this point.[971] In its 1999 orders concerning the requests for provisional measures submitted by Yugoslavia against Spain and the United States of America, the Court simply considered that:

> Whereas the Genocide Convention does not prohibit reservations; whereas Yugoslavia did not object to Spain's reservation to article IX; and whereas the said reservation had the effect of excluding that article from the provisions of the Convention in force between the Parties (...).[972]

The Court's reasoning did not include any review of the validity of the reservation, apart from the observation that the 1948 Convention did not prohibit it. The only determining factor seems to have been the absence of an objection by the State concerned; this reflects the position which the Court had taken in 1951 but which had subsequently been superseded by the Vienna Convention, with which it is incompatible:[973]

> The object and purpose [of the treaty] (...) limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation.[974]

Nonetheless, in its order concerning the request for provisional measures in the case of *Armed activities on the territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, the Court modified its approach by considering *in limine* the permissibility of Rwanda's reservation:

> That reservation does not bear on the substance of the law, but only on the Court's jurisdiction; ... it therefore does not appear contrary to the object and purpose of the Convention.[975]

And in its judgment on the jurisdiction of the Court and the admissibility of the application, the Court confirmed that:

> Rwanda's reservation to Article IX of the Genocide Convention bears on the jurisdiction of the Court, and does not affect substantive obligations relating to acts of genocide themselves under that Convention. In the circumstances of the present case, the Court cannot conclude that the reservation of Rwanda in question, which is meant to exclude a particular method of settling a dispute relating to the interpretation, application or fulfilment of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention.[976]

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[971] See the joint separate opinion of Judges Higgins, Kooijmans, Eleraby, Owada and Simma annexed to the judgment of 3 February 2006, *Armed activities on the territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), I.C.J. Reports 2006*, pp. 65–71.

[972] Orders of 2 June 1999, *Legality of Use of Force (Yugoslavia v. Spain), Provisional Measures, I.C.J. Reports 1999*, p. 772, para. 32, and p. 924, para. 24.

[973] See paras. (2) to (9) of the commentary to guideline 2.6.3.

[974] Advisory Opinion of 28 May 1951, *I.C.J. Reports 1951* (see footnote 305 above), p. 24.

[975] Order of 10 July 2002, *Armed activities on the territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), I.C.J. Reports 2002*, p. 246, para. 72.

[976] Judgment of 3 February 2006, *Armed activities on the territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, I.C.J. Reports 2006*, p. 32, para. 67.

The Court thus "added its own assessment as to the compatibility of Rwanda's reservation with the object and purpose of the Genocide Convention".[977] Even though an objection by the Democratic Republic of the Congo was not required in order to assess the validity of the reservation, the Court found it necessary to add:

> As a matter of the law of treaties, when Rwanda acceded to the Genocide Convention and made the reservation in question, the DRC made no objection to it.[978]

(5) This clarification is not superfluous. Indeed, although an objection to a reservation does not determine the validity of the reservation as such, it is an important element to be considered by all actors involved – the author of the reservation, the contracting States and contracting organizations, and any body with competence to assess the validity of a reservation. Nonetheless, it should be borne in mind that, as the Court indicated in its 1951 advisory opinion:

> each State which is a party to the Convention is entitled to appraise the validity of the reservation and it exercises this right individually and from its own standpoint.[979]

(6) The judgment of the European Court of Human Rights in the *Loizidou* case also attaches great importance to the reactions of States parties as an important element to be considered in assessing the validity of Turkey's reservation.[980] The Human Rights Committee confirmed this approach in its general comment No. 24:

> The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant (...). However, an objection to a reservation made by States may provide some guidance to the Committee in its interpretation as to its compatibility with the object and purpose of the Covenant.[981]

(7) During consideration of the report of the Commission on the work of its fifty-seventh session in 2005 (A/60/10), Sweden, replying to the Commission's question regarding "minimum effect" objections based on the incompatibility of a reservation with the object and purpose of the treaty,[982] expressly maintained this position:

> Theoretically, an objection was not necessary in order to establish that fact but was merely a way of calling attention to it. The objection therefore had no real legal effect of its own and did not even have to be seen as an objection ... . However, in the absence of a body that could authoritatively classify a reservation as invalid,

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[977] Joint separate opinion, cited above in footnote 971, p. 70, para. 20.

[978] See footnote 977 above, p. 33, para. 68.

[979] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 26. See also the advisory opinion of the Inter-American Court of Human Rights on the effect of reservations on the entry into force of the American Convention on Human Rights, OC-2/82, 24 September 1982, Series A, No. 2, para. 38 ("The States Parties have a legitimate interest, of course, in barring reservations incompatible with the object and purpose of the Convention. They are free to assert that interest through the adjudicatory and advisory machinery established by the Convention").

[980] See para. 95 of the judgment of the European Court and para. (8) of the commentary to guideline 4.5.2 above.

[981] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (A/50/40), p. 151, para. 17.

[982] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 29.

> such as the European Court of Human Rights, such "objections" still served an important purpose.[983]

(8) As established above,[984] the Vienna Conventions do not contain any rule concerning the effects of reservations that do not meet the conditions of permissibility set out in article 19, or — as a logical consequence thereof — concerning the potential reactions of States to such reservations. Under the Vienna regime, an objection is not an instrument by which contracting States or organizations assess the validity of a reservation; rather, it renders the reservation inapplicable as against the author of the objection.[985] The acceptances and objections mentioned in article 20 concern only valid reservations. The mere fact that these same instruments are used in State practice to react to invalid reservations does not mean that these reactions produce the same effects or that they are subject to the same conditions as objections to valid reservations.

(9) In the opinion of the Commission, however, this is not a sufficient reason not to consider these reactions as true objections. Such a negative reaction is fully consistent with the definition of the term "objection" adopted by the Commission in guideline 2.6.1 and constitutes

> a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the former State or organization purports to exclude ... the legal effects of the reservation, or to exclude the application of the treaty as a whole, in relations with the reserving State or organization.[986]

The mere fact that ultimately, it is not the objection that achieves the desired goal by depriving the reservation of effects, but rather the nullity of the reservation, does not change the goal sought by the objecting State or organization: to exclude all effects of the invalid reservation. Thus, it seems neither appropriate nor useful to create a new term for these reactions to reservations, since the current term not only corresponds to the definition of "objection" adopted by the Commission but is used extensively in State practice and, it would appear, is universally accepted and understood.

(10) Moreover, although an objection to an invalid reservation adds nothing to the nullity of the reservation, it is undoubtedly a prime instrument both for initiating the reservations dialogue and for bringing the matter to the attention of treaty bodies and international and domestic courts when they are called upon, as appropriate, to assess the validity of a reservation. Consequently, it would not be advisable — and would, in fact, be misleading — simply to note in the Guide to Practice that an objection to an invalid reservation is without effect.

(11) On the contrary, it is vitally important for States to continue to formulate objections to reservations that they consider invalid, even though such declarations do not add anything to the effects arising *ipso jure* and without any other condition from the invalidity of the reservation. This is all the more important as there are, in fact, only a few bodies that are competent to assess the validity of a contested reservation. As is usual in international law — in this area as in many others — the absence of an objective assessment mechanism

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[983] A/C.6/60/SR.14, para. 22.

[984] See paras. (1) to (18) of the general commentary to section 4.5.

[985] See paras. (2) to (5) of the commentary of guideline 4.3.

[986] For the full text of guideline 2.6.1 (Definition of objections to reservations) and the commentary thereto, see *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/60/10), pp. 186–202.

remains the rule, and its existence the exception.[987] Hence, pending a very hypothetical intervention by an impartial third party, "each State establishes for itself its legal situation *vis-à-vis* other States" – including, of course, on the issue of reservations.[988]

(12) States should not be discouraged from formulating objections to reservations that they consider invalid. On the contrary, in order to maintain stable treaty relations, they should be encouraged to do so and encouraged to provide, as far as possible, reasons for their position.[989] This is why draft guideline 4.5.3 not only sets out the principle that an objection to an invalid reservation does not, as such, produce effects; it also discourages any hasty inference, from the statement of that principle, that such an objection is futile.

(13) Indeed, it is in every respect very important for States and international organizations to formulate an objection, when they deem it justified, in order to state publicly their position on the invalidity of a reservation. Nevertheless, they do so on the basis merely of their power of appraisal, which is why the second paragraph of guideline 4.5.3 takes the form of a simple recommendation to States and international organizations, the purely optional nature of which is evidenced by the use of the conditional "should" and the expression "if it deems it appropriate".

(14) Moreover, while it may be preferable, it is not indispensable[990] for these objections to be formulated within the time period of 12 months, or within any other time period set out in the treaty.[991] Although they have, as such, no legal effect on the reservation, such objections still serve an important purpose not only for the author of the reservation — which would be alerted to the doubts surrounding its validity — but also for the other contracting States or contracting organizations and for any authority that may be called upon to assess the validity of the reservation.

(15) This comment is not, however, to be taken as an encouragement to formulate late objections on the grounds that, even without the objection, the reservation is null and void and produces no effect. It is in the interests of the author of the reservation, the other contracting States and contracting organizations and, more generally, of a stable, clear legal situation, for objections to invalid reservations to be made and to be formulated as quickly

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[987] Judgment of 18 July 1966, *South West Africa Cases, Second Phase, I.C.J. Reports 1966*, para. 86: "In the international field, the existence of obligations that cannot in the last resort be enforced by any legal process, has always been the rule rather than the exception".

[988] Decision of 9 December 1978, Case of *Air Service Agreement of 27 March 1946 between the United States of America and France, Reports of International Arbitral Awards*, vol. XVIII, p. 483, para. 81.

[989] See guideline 2.6.10 (Statement of reasons), which recommends that the author of an objection to a reservation should indicate the reasons why it is being made. (*Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), pp. 203–206).

[990] The Government of Italy, in its late objection to Botswana's reservations to the International Covenant on Civil and Political Rights, explained: "The Government of the Italian Republic considers these reservations to be incompatible with the object and the purpose of the Covenant according to article 19 of the 1969 Vienna Convention on the Law of Treaties. These reservations do not fall within the rule of article 20, paragraph 5, and can be objected to at any time" (*Multilateral Treaties* ..., footnote 341 above, chap. IV.4. See also Italy's objection to the reservation of Qatar to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, formulated by Qatar (*ibid.*, chap. IV.9); and the position expressed by Sweden in the Sixth Committee during consideration of the report of the Commission on the work of its fifty-seventh session (A/C.6/60/SR.14, para. 22).

[991] For other recent examples, see the objections of Portugal and Mexico to the reservation formulated by Qatar upon acceding to the Convention on the Elimination of All Forms of Discrimination against Women (*Multilateral Treaties* ..., footnote 341 above, chap. IV.8. Both objections were made on 10 May 2010 (C.N.260.2010.TREATIES-16A and C.N.264.2010.TREATIES-16); Qatar's instrument of accession was communicated by the Secretary-General on 8 May 2009.

as possible, so that the legal situation can be appraised rapidly by all the actors and the author of the reservation can potentially remedy the invalidity within the framework of the reservations dialogue. For this reason, the second paragraph of guideline 4.5.3 calls on States and organizations to formulate a reasoned objection "as soon as possible".

4.6 Absence of effect of a reservation on the relations between the other parties to the treaty

A reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

Commentary

(1) Guideline 4.6 reproduces verbatim the text of article 21, paragraph 2, of the Vienna Conventions (the wording of which is identical in the two Conventions).

(2) Pursuant to this provision, treaty relations between the parties to the treaty other than the author of the reservation are not affected by the reservation. This rule of the relativity of legal relations is designed to preserve the normative system applicable as between the other parties to the treaty. This is not necessarily the only regime, since the other parties may also make their consent subject to reservations which would then modify their mutual relations as envisaged in article 21, paragraphs 1 and 3.[992] Like paragraph 2 of this article, the purpose of guideline 4.6 is not to prevent the multiplication of normative systems that could be established within the same treaty, but only to limit the effects of the reservation to the bilateral relations between its author, on the one hand, and each of the other parties, on the other.[993]

(3) The scope of the guideline is not limited to "established" reservations — reservations that meet the requirements of articles 19, 20 and 23[994] — but this is not a drafting inconsistency. Indeed, the principle of the relativity of reservations applies irrespective of the reservation's permissibility or formal validity. This is particularly obvious in the case of invalid reservations, which, owing to their nullity, are deprived of any effect — for the benefit of their authors and, of course, for the benefit or to the detriment of the other parties to the treaty.[995]

(4) Furthermore, the acceptance of a reservation or objections to which it gives rise also have no bearing on the effects of the reservation beyond the bilateral relations between the author of the reservation and each of the other parties. Whether tacit or express, acceptance merely identifies the parties for whom the reservation is considered to be established — those which have accepted the reservation[996] — in order to distinguish them from parties for whom the reservation does not produce any effect — those which have made an objection to the reservation. However, in relations between all parties other than the author of the reservation, the reservation cannot modify or exclude the legal effects of one or more provisions of the treaty, or of the treaty as a whole, regardless of whether these States or organizations have accepted the reservation or objected to it.

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[992] See F. Horn, footnote 321 above, p. 142.

[993] It is not appropriate here to speak of a "contracting State" or "contracting organization", as guideline 4.6 has no practical effect until the treaty has entered into force.

[994] See guideline 4.1 above ("Establishment of a reservation with regard to another State or organization") and the commentary thereto.

[995] See paragraphs (14) to (28) of the commentary to guideline 4.5.1 above.

[996] See guideline 4.1 above and the commentary thereto.

(5) Although article 21, paragraph 2 (and hence guideline 4.6, which uses the same wording), does not contain any limitation or exception, it might be wondered whether the rule of the "relativity of legal relations" is as absolute as these provisions state.[997] In any case, Waldock made this point more cautiously in the annex to his first report, entitled "Historical summary of the question of reservations to multilateral conventions": "*in principle*, a reservation only operates in the relations of States with the reserving State".[998] This then raises the question of whether there are treaties to which the principle of relativity does not apply.

(6) The specific treaties referred to in article 20, paragraphs 2 and 3, are definitely not an exception to the relativity rule. It is true that the relativity of legal relations is, to some extent, limited in the case of these treaties, since by definition the reservation produces its effects in the relations between the author and *all* other parties; however, it has no effect with regard to the other States parties' relations *inter se*, which remain unchanged.

(7) Although, in the case of treaties that must be applied in their entirety, the parties must all give their consent in order for the reservation to produce its effects, this unanimous consent does not, in itself, constitute a modification of the treaty itself as between the parties thereto. Here too, a distinction should therefore be made between two normative systems within the same treaty: the system governing relations between the author of the reservation and each of the other parties which have, by definition, all accepted the reservation, on the one hand, and the system governing relations between these other parties, on the other. The relations between the other parties remain unchanged.

(8) The same reasoning applies in the case of constituent instruments of international organizations. Although in this case the consent is not necessarily unanimous, it does not in any way modify the treaty relations between parties other than the author of the reservation. The majority system simply imposes on the minority members the position of the majority in respect of the author of the reservation, precisely to avoid the establishment of multiple normative systems within the constituent instrument. But in this case, it is the acceptance of the reservation by the organ of the organization which generalizes the application of the reservation, and probably exclusively in the other parties' relations with the reserving State or organization.

(9) Even in the event of unanimous acceptance of a reservation which is *a priori* invalid,[999] it is not the reservation which has been "validated" by the consent of the parties that modifies the "general" normative system applicable as between the other parties. Granted, this normative system is modified insofar as the prohibition of the reservation is lifted or the object and purpose of the treaty are modified (or deemed to be modified) in order to make the reservation valid. Nonetheless, this modification of the treaty, which has implications for all the parties, arises not from the reservation, but from the unanimous consent of the States and organizations that are parties to the treaty, which is the basis of an agreement aimed at modifying the treaty in order to authorize the reservation within the meaning of article 39 of the Vienna Conventions.[1000]

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[997] Renata Szafarz maintains that "it is obvious, of course, that 'the reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*'" (*op. cit.*, footnote 593 above, p. 311).

[998] First report on the law of treaties (A/CN.4/144), *Yearbook of the International Law Commission 1962*, vol. II, p. 76, n. 5e (emphasis added).

[999] See guideline 3.3.3 above.

[1000] See para. (1) of the commentary to guideline 3.3.3 above.

(10) It should be noted, however, that the parties are still free to modify their treaty relations if they deem it necessary.[1001] This possibility may be deduced *a contrario* from the Commission's commentary to draft article 19 of the 1966 draft articles on the law of treaties (which became article 21 of the 1969 Convention). In the commentary, the Commission stated that a reservation:

> "does not modify the provisions of the treaty for the other parties, *inter se*, since they have not accepted it as a term of the treaty in their mutual relations".[1002]

(11) Moreover, nothing prevents the parties from accepting the reservation as a real clause of the treaty ("negotiated reservations"[1003]) or from changing any other provision of the treaty, if they deem it necessary. However, such modification can neither result automatically from acceptance of a reservation nor be presumed. The parties must follow the procedures set out for this purpose in the treaty or, in the absence thereof, the procedure established by articles 39 *et seq.* of the Vienna Conventions. In fact, it may become necessary, if not indispensable, to modify the treaty in its entirety.[1004] This depends, however, on the circumstances of each case and remains at the discretion of the parties. Consequently, it does not seem indispensable to provide for an exception to the principle established in article 21, paragraph 2, of the Vienna Conventions. In addition, like all the guidelines in the Guide to Practice, guideline 4.6 should be construed to mean "without prejudice to any agreement reached between the parties as to its application".

4.7 Effect of an interpretative declaration

Commentary

(1) Despite a long-standing and highly developed practice, neither the Vienna Convention of 1969 nor that of 1986 contains rules concerning interpretative declarations, much less the possible effects of such a declaration.[1005]

(2) The *travaux préparatoires* to the Conventions explain this absence. While the problem of interpretative declarations was completely overlooked by the first special rapporteurs,[1006] Waldock[1007] was aware both of the practical difficulties these declarations

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[1001] F. Horn, footnote 321 above, pp. 142–143.

[1002] *Yearbook ... 1966*, vol. II, p. 209, para. 1.

[1003] See *Yearbook ... 2000*, vol. II, Part Two, p. 116, para. (11) of the commentary on guideline 1.1.8.

[1004] Such a situation may occur, *inter alia*, in commodity treaties in which even the principle of reciprocity cannot restore the balance between the parties (H.G. Schermers, "The suitability of reservations to multilateral treaties", *Nederlands Tijdschrift voor Internationaal Recht*, vol. VI, No. 4 (1959), p. 356). Article 64, paragraph 2 (c), of the 1968 International Sugar Agreement seemed to provide for the possibility of adapting provisions the application of which had been compromised by the reservation: "In any other instance where reservations are made [namely in cases where the reservation concerns the economic operation of the Agreement], the Council shall examine them and decide, by special vote, whether they are to be accepted *and, if so, under what conditions*. Such reservations shall become effective only after the Council has taken a decision on the matter" (emphasis added). See also P.-H. Imbert, footnote 522 above, p. 250; and F. Horn, footnote 321 above, pp. 142–143.

[1005] See *Yearbook ... 1999*, vol. II, Part Two, p. 97, para. (1) of the commentary on guideline 1.2.

[1006] Fitzmaurice limited himself to specifying that the term "reservation" "does not include mere statements as to how the State concerned proposes to implement the treaty, or declarations of understanding or interpretation, unless these imply a variation on the substantive terms or effect of the treaty" (first report on the law of treaties, A/CN.4/101, *Yearbook ... 1956*, vol. II, p. 110).

[1007] In his definition of the term "reservation", Waldock explained that "an explanatory statement or statement of intention or of understanding as to the meaning of the treaty, which does not amount to a variation in the legal effect of the treaty, does not constitute a reservation" (first report on the law of created, and of the solution, a very simple solution, required. Indeed, several Governments returned in their comments to the draft articles adopted on first reading, not just to the absence of interpretative declarations and the distinction that should be drawn between such declarations and reservations,[1008] but also to the elements to be taken into account when interpreting a treaty.[1009] In 1965, the Special Rapporteur made an effort to reassure those States by affirming that the question of interpretative declarations had not escaped the notice of the Commission. He continued:

> Interpretative declarations, however, remained a problem, and possibly also statements of policy made in connection with a treaty. The question was what the effect of such declarations and statement should be. Some rules which touched the subject were contained in article 69, particularly its paragraph 3 on the subject of agreement between the parties regarding the interpretation of the treaty and of the subsequent practice in its application. Article 70, which dealt with further means of interpretation, was also relevant.[1010]

(3) Contrary to the positions expressed by some members of the Commission,[1011] the effect of an interpretative declaration "was governed by the rules on interpretation".[1012] Although "interpretative statements are certainly important, (...) it may be doubted whether they should be made the subject of specific provisions; for the legal significance of an interpretative statement must always depend on the particular circumstances in which it is made".[1013]

(4) At the Vienna Conference of 1968–1969, the question of interpretative declarations was debated once again, in particular in connection with a Hungarian amendment to the definition of the term "reservation"[1014] and to article 19 (which became article 21)

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treaties, A/CN.4/144, *Yearbook ... 1962*, vol. II, p. 37).

[1008] See in particular the comments of the Japanese Government summarized in the fourth report on the law of treaties by Sir Humphrey Waldock (A/CN.4/177 and Add.1 and 2, *Yearbook ... 1965*, vol. II, p. 50) and the comment of the British Government that "article 18 deals only with reservations and assumes that the related question of statements of interpretation will be taken up in a later report" (*ibid.*, p. 51).

[1009] See the comments of the United States of America on draft articles 69 and 70 concerning interpretation, summarized in the sixth report on the law of treaties by Sir Humphrey Waldock (A/CN.4/183 and Add.1 to 4, *Yearbook ... 1966*, vol. II, p. 100).

[1010] *Yearbook ... 1965*, vol. I, 799th meeting, 10 June 1965, p. 165, para. 13. See also Sir Humphrey Waldock, Fourth report on the law of treaties, A/CN.4/177 and Add.1 and 2, *Yearbook ... 1965*, vol. II, p. 49, para. 2.

[1011] See the comments of Mr. Verdross (*Yearbook ... 1965*, vol. I, 797th meeting, 8 June 1965, p. 151, para. 36, and 799th meeting, 10 June 1965, p. 166, para. 23) and Mr. Ago (*ibid.*, 798th meeting, 9 June 1965, p. 162, para. 76). See also Mr. Castrén (*ibid.*, 799th meeting, 10 June 1965, p. 166, para. 30) and Mr. Bartos (*ibid.*, para. 29).

[1012] *Yearbook ... 1965*, vol. I, 799th meeting, 10 June 1965, p. 165, para. 14. See also Sir Humphrey Waldock, Fourth report on the law of treaties, A/CN.4/177 and Add.1 and 2, *Yearbook ... 1965*, vol. II, p. 49, para. 2 ("Statements of interpretation were not dealt with by the Commission in the present section for the simple reason that *they are not reservations and appear to concern the interpretation rather than the conclusion of treaties*") (emphasis added).

[1013] *Ibid.*

[1014] A/CONF.39/C.1/L.23, in *United Nations Conference on the Law of Treaties, Documents of the Conference* (A/CONF.39/11/Add.2), footnote 313 above, p. 112, para. 35 (vi) (e). The Hungarian delegation proposed the following text: "'Reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, acceding to, accepting or approving a *multilateral* treaty, whereby it purports to exclude, to vary *or to interpret* the legal effect of certain provisions of the treaty in their application to that State" (emphasis in the original text).

concerning the effects of a reservation.[1015] The effect of this amendment was to assimilate interpretative declarations to reservations, without making any distinction between the two categories, in particular with regard to their respective effects. Several delegations were nevertheless clearly opposed to such an assimilation.[1016] Waldock, in his capacity as Expert Consultant, had

> "issued a warning against the dangers of the addition of interpretative declarations to the concept of reservations. In practice, a State making an interpretative declaration usually did so because it did not want to become enmeshed in the network of the law on reservations".[1017]

Consequently, he appealed

> "to the Drafting Committee to bear the delicacy of the question in mind and not to regard the assimilation of interpretative declarations to reservations as an easy matter".[1018]

In the end, the Drafting Committee had not retained the Hungarian amendment. Although Mr. Sepúlveda-Amor, on behalf of Mexico, had drawn attention to "the absence of a definition of the instrument envisaged in paragraph 2 (b) of article 27 [which became article 31]", while "interpretative declarations of that type were common in practice"[1019] and suggested that "it was essential to set forth clearly the legal effects of such declarations, as distinct from those of actual reservations",[1020] as none of the provisions of the Vienna Convention had been devoted specifically to interpretative declarations. Waldock's conclusions regarding the effects of these declarations[1021] were thus confirmed by the work of the Conference.

(5) Neither the work of the Commission nor the Vienna Conference of 1986 have further elucidated the question of the concrete effects of an interpretative declaration.

(6) Here too, the Commission has found itself obliged to fill a gap in the Vienna Conventions, and has done so in section 4.7 of the Guide to Practice while endeavouring to remain within the logic of the Conventions and, in particular, of their articles 31 and 32 on the interpretation of treaties.

4.7.1 Clarification of the terms of the treaty by an interpretative declaration

An interpretative declaration does not modify treaty obligations. It may only specify or clarify the meaning or scope which its author attributes to a treaty or to certain provisions thereof and may, as appropriate, constitute an element to be taken into account in interpreting the treaty in accordance with the general rule of interpretation of treaties.

In interpreting the treaty, account shall also be taken, as appropriate, of the approval of, or opposition to, the interpretative declaration by other contracting States or contracting organizations.

[1015] A/CONF.39/C.1/L.177, *ibid.*, p. 140, para. 199 (ii) (d) and (iii). See also the explanations provided at the Conference, in *United Nations Conference on the Law of Treaties, First session, Summary records* (A/CONF.39/11), footnote 313 above, 25th meeting, 16 April 1968, p. 137, paras. 52 and 53.

[1016] See in particular the position of Australia (*ibid.* (A/CONF.39/11), 5th meeting, 29 March 1968, p. 29, para. 81), Sweden (*ibid.*, p. 30, para. 102), the United States of America (*ibid.*, 6th meeting, p. 31, para. 116) and the United Kingdom (*ibid.*, 25th meeting, 16 April 1968, p. 137, para. 60).

[1017] *Ibid.*, p. 137, para. 56.

[1018] *Ibid.*

[1019] *Ibid.*, 21st meeting, 10 April 1968, p. 113, para. 62.

[1020] *Ibid.*

[1021] See para. (2) of this commentary above.

Commentary

(1) The absence a specific provision in the Vienna Conventions concerning the legal effects of an interpretative declaration[1022] is likely to produce does not mean, however, that they contain no indications on that subject, as the comments made during their elaboration will show.[1023]

(2) As their name clearly indicates, their object and function consists in proposing an interpretation of the treaty.[1024] Consequently, in accordance with the definition retained by the Commission:

> "Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.[1025]

(3) Specifying or clarifying the provisions of a treaty is indeed to interpret it and, for this reason, the Commission used those terms to define interpretative declarations.[1026] Although, as the commentary to draft guideline 1.2 (Definition of interpretative declarations) makes clear, the definition "in no way prejudges the validity or the effect of such declarations",[1027] it seems almost obvious that the effect of an interpretative declaration is essentially produced through the highly complex process of interpretation.

(4) Before considering the role such a declaration may play in the interpretation process, it is important to specify the effect that it may definitely not produce. It is clear from the comparison between the definition of interpretative declarations and that of reservations that whereas the latter are intended to modify the legal effect of the treaty or exclude certain of its provisions as they apply to the author of the reservation, the former have no aim other than to specify or clarify its meaning. The author of an interpretative declaration does not seek to relieve itself of its international obligations under the treaty; it intends to give a particular meaning to those obligations. As Yaseen has clearly explained:

> A State which formulated a reservation recognized that the treaty had, generally speaking, a certain force; but it wished to vary, restrict or extend one or several provisions of the treaty insofar as the reserving State itself was concerned.
>
> A State making an interpretative declaration declared that, in its opinion, the treaty or one of its articles should be interpreted in a certain manner; it attached an objective and general value to that interpretation. In other words, it considered itself bound by the treaty and wished, as a matter of conscience, to express its opinion concerning the interpretation of the treaty.[1028]

(5) If the effect of an interpretative declaration consisted in modifying the treaty, it would actually constitute a reservation, not an interpretative declaration. The Commission's commentary to article 2, paragraph 1 (d), of its 1966 draft articles describes this dialectic unequivocally:

[1022] See the introductory commentary to section 4.7 of the Guide to Practice above.

[1023] See para. (2) of the introductory commentary to section 4.7 above.

[1024] *Yearbook ... 1999*, vol. II, Part Two, p. 100, para. (16) of the commentary to guideline 1.2.

[1025] Guideline 1.2 (Definition of interpretative declarations), *Yearbook ... 1999*, vol. II, Part Two, pp. 97–103.

[1026] See the commentary to draft guideline 1.2 (Definition of interpretative declarations), *ibid.*, p. 100–101, para. (18).

[1027] *Ibid.*, p. 103, para. (33) of the commentary.

[1028] *Yearbook ... 1965*, vol. I, 799th meeting, 10 June 1965, p. 166, paras. 25–26.

> States, when signing, ratifying, acceding to, accepting or approving a treaty, not infrequently make declarations as to their understanding of some matter or as to their interpretation of a particular provision. Such a declaration may be a mere clarification of the State's position or it may amount to a reservation, according as it does or does not vary or exclude the application of the terms of the treaty as adopted.[1029]

(6) The International Court of Justice has also maintained that the interpretation of a treaty may not lead to its modification. As it held in its advisory opinion concerning *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*: "It is the duty of the Court to interpret the Treaties, not to revise them."[1030]

(7) It may be deduced from the foregoing that an interpretative declaration may in no way modify the treaty provisions. Whether or not the interpretation is correct, its author remains bound by the treaty. This is certainly the intended meaning of the *dictum* of the European Commission of Human Rights in the *Belilos* case, in which the Commission held that an interpretative declaration:

> may be taken into account when an article of the Convention is being interpreted; but if the Commission or the Court reached a different interpretation, the State concerned would be bound by that interpretation.[1031]

(8) In other words, a State (or an international organization) may not escape the risk of violating its international obligations by basing itself on an interpretation that it put forward unilaterally. In the case where the State's interpretation does not correspond to the "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose",[1032] the conduct adopted by the author of the declaration in the course of enforcing the treaty runs a serious risk of violating its treaty obligations.[1033]

(9) If a State or international organization has made its interpretation a condition for its agreement to be bound by the treaty, in the form of a conditional interpretative declaration within the meaning of guideline 1.2.1 (Definition of conditional interpretative declarations),[1034] the situation is slightly different. Of course, if the interpretation proposed by the author of the declaration and the interpretation of the treaty given by an authorized third body[1035] are in agreement, there is no problem; the interpretative declaration remains

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[1029] *Yearbook ... 1966*, vol. II, p. 190, para. (11) of the commentary. See also Waldock's explanations, *Yearbook ... 1965*, vol. I, 799th meeting, p. 165, para. 14 ("the crucial point was that, if the interpretative declaration constituted a reservation, its effect would be determined by reference to the provisions of articles 18 to 22. In that event, consent would operate, but in the form of rejection or acceptance of the reservation by other interested States. If, however, the declaration did not purport to vary the legal effect of some of the treaty's provisions in its application to the State making it, then it was interpretative and was governed by the rules on interpretation").

[1030] Advisory opinion of 18 July 1950, *I.C.J. Reports 1950*, p. 229. See also the Judgments of 27 August 1952, case concerning *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, *I.C.J. Reports 1952*, p. 196, and 18 July 1966, *South West Africa* cases (*Liberia and Ethiopia v. South Africa*), *I.C.J. Reports 1966*, p. 48, para. 91.

[1031] Report of 7 May 1986, vol. 1, No. 32, para. 102.

[1032] Article 31, para. 1, of the Vienna Conventions.

[1033] See also Donald M. McRae, "The Legal Effect of Interpretative Declarations", *British Year Book of International Law*, vol. 49 (1978), p. 161; M. Heymann, footnote 423 above, p. 126; or Frank Horn, footnote 321 above, p. 326.

[1034] *Yearbook ... 1999*, vol. II, Part Two, pp. 103–106.

[1035] It is hardly likely that the "authentic" interpretation of the treaty (that is, the one agreed by all the parties) will differ significantly from that given by the author of the interpretative declaration: by definition, an authentic interpretation arises from the parties themselves. See Jean Salmon (ed.), merely interpretative and may play the same role in the process of interpreting the treaty as that of any other interpretative declaration. If, however, the interpretation given by the author of the interpretative declaration does not correspond to the interpretation of the treaty objectively established (following the rules of the Vienna Conventions) by an impartial third body, a problem arises: the author of the declaration does not intend to be bound by the treaty as it has thus been interpreted, but only by the treaty text as interpreted and applied in the manner which it has proposed. It has therefore made its consent to be bound by the treaty dependent upon a particular "interpretation" which — it is assumed — does not fall within the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. In this case — but in this case only — the conditional interpretative declaration must be equated to a reservation and may produce only the effects of a reservation, if the corresponding conditions have been met. This eventuality, which is not merely hypothetical, explains why such an interpretative declaration, although not intended under its terms to modify the treaty, must nonetheless be subject to the same legal regime that applies to reservations.[1036] As has been emphasized:

> Since the declaring State is maintaining its interpretation regardless of the true interpretation of the treaty, it is purporting to exclude or to modify the terms of the treaty. Thus, the consequences attaching to the making of reservations should apply to such a declaration.[1037]

(10) In cases of a simple interpretative declaration, however, the fact of proposing an interpretation which is not in accordance with the provisions of the treaty in no way changes the declaring State's position with regard to the treaty. The State remains bound by it and must respect it. This position has also been confirmed by Professor McRae:

> The State has simply indicated its view of the interpretation of the treaty, which may or may not be the one that will be accepted in any arbitral or judicial proceedings. In offering this interpretation the State has not ruled out subsequent interpretative proceedings nor has it ruled out the possibility that its interpretation will be rejected. Provided, therefore, that the State making the reservation still contemplates an ultimate official interpretation that could be at variance with its own view, there is no reason for treating the interpretative declaration in the same way as an attempt to modify or to vary the treaty.[1038]

(11) Although an interpretative declaration does not affect the normative force and binding character of the obligations contained in the treaty, it may still produce legal effects or play a role in the interpretation of the treaty. It has already been noted during the consideration of the validity of interpretative declarations[1039] that "on the basis of its sovereignty, every State has the right to indicate its own understanding of the treaties to

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Dictionnaire de droit international public, Bruylant, Brussels, 2001, p. 604: "An interpretation issued by the author or by all the authors of the provision being interpreted — in the case of a treaty, by all the parties — in due form so that its authority may not be questioned."

[1036] See in particular sections 4.2 and 4.5 of the Guide to Practice.

[1037] Donald M. McRae, footnote 1033 above, p. 161. See also Monika Heymann, footnote 423 above, pp. 147–148. Ms. Heymann thinks that a conditional interpretative declaration must be treated as a reservation only in the case where the treaty creates a competent body to provide an authentic interpretation. In other cases, she considers that the conditional interpretative declaration may never modify the treaty provisions (*ibid.*, pp. 148–150).

[1038] McRae, footnote 1033 above, p. 160.

[1039] See para. (15) of the introductory commentary to guideline 3.5.

which it is party".[1040] This corresponds to a need: those to whom a legal rule is addressed must necessarily interpret it in order to apply it and meet their obligations.[1041]

(12) Interpretative declarations are above all an expression of the parties' concept of their international obligations under the treaty. They are a means of determining the intention of the contracting States or contracting organizations with regard to their treaty obligations. It is in this connection, as an element relating to the interpretation of the treaty, that case law[1042] and doctrine have affirmed the need to take into account interpretative declarations in the treaty process. McRae puts it this way:

> In fact, it is here that the legal significance of an interpretative declaration lies, for it provides evidence of intention in the light of which the treaty is to be interpreted.[1043]

(13) Monika Heymann shares this view. She affirms, on the one hand, that an interpretation which is not accepted or is accepted only by certain parties cannot constitute an element of interpretation under article 31 of the Vienna Convention; on the other hand, she adds: "*Das schließt aber nicht aus, dass sie unter Umständen als Indiz für einen gemeinen Parteiwillen herangezogen werden könnte*"[1044] [That does not exclude the possibility, however, that it may be used, under certain conditions, as an indication of the common intention of the parties].

(14) The French Constitutional Council shares this view and has clearly limited the object and role of an interpretative declaration by the French Government to the interpretation of the treaty alone: "Whereas, moreover, the French Government has accompanied its signature with an interpretative declaration in which it specifies the meaning and scope which it intends to give to the Charter or to some of its provisions with regard to the Constitution, such unilateral declaration shall have normative force only in that it constitutes an instrument connected with the treaty and may contribute, in the case of a dispute, to its interpretation."[1045]

(15) Draft guideline 4.7, paragraph 1, takes up these two ideas in order to clarify, on the one hand, that an interpretative declaration has no impact on the rights and obligations under the treaty and, on the other, that it produces its effects only in the process of interpretation.

(16) Because of the very nature of the operation of interpretation — which is a process,[1046] an art rather than an exact science[1047] — it is not possible in a general and abstract manner to determine the value of an interpretation other than by referring to the "general rule of interpretation" which is set out in article 31 of the Vienna Conventions on the Law of Treaties and which cannot be called into question or "revisited" in the context of

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[1040] P. Daillier, M. Forteau and A. Pellet, *Droit international public* (*Nguyen Quoc Dinh*), (Paris: Librairie générale de droit et de jurisprudence (LGDJ), 2010), p. 277.

[1041] Georges Abi-Saab, "'Interprétation' et 'auto-interprétation': quelques réflexions sur leur rôle dans la formation et la résolution du différend international", in *Recht zwischen Umbruch und Bewahrung: Völkerrecht, Europarecht, Staatsrecht: Festschrift für Rudolf Bernhardt* (Berlin: Springer, 1995), p. 14.

[1042] See footnote 1031 above.

[1043] McRae, *op. cit.*, footnote 1033 above, p. 169.

[1044] *Op. cit.*, footnote 423 above, p. 135.

[1045] Constitutional Council, Decision No. 99-412 DC, 15 June 1999, *European Charter for Regional or Minority Languages, Official Gazette of the French Republic*, 18 June 1999, p. 8964, para. 4.

[1046] A "logico-intellective" operation, according to Rosario Sapienza, "Les déclarations interprétatives unilatérales et l'interprétation des traités", *Revue générale de droit international public*, vol. 103 (1999), p. 623.

[1047] See paras. (13) and (14) of the commentary to guideline 3.5.

the present exercise.[1048] Therefore, in the Guide to Practice, the problem must necessarily be limited to the question of the authority of a proposed interpretation in an interpretative declaration and the question of its probative value for any third party interpreter, that is, its place and role in the process of interpretation.

(17) With regard to the first question — the authority of the interpretation proposed by the author of an interpretative declaration — it should be remembered that, according to the definition of interpretative declarations, they are unilateral statements.[1049] The interpretation which such a statement proposes, therefore, is itself only a unilateral interpretation which, as such, has no particular value and certainly cannot, as such, bind the other parties to the treaty. This common-sense principle was affirmed as far back as Vattel:

> Neither the one nor the other of the parties interested in the contract has a right to interpret the deed or treaty according to his own fancy.[1050]

(18) During the discussion on draft article 70 (which became article 31 of the 1969 Vienna Convention) containing the general rule of interpretation, Mr. Rosenne expressed the view:

> that a situation might arise where, for instance, there might be a unilateral understanding on the meaning of a treaty by the United States Senate that was not always accepted by the other side. A purely unilateral interpretative statement of that kind made in connection with the conclusion of a treaty could not bind the parties.[1051]

(19) The Appellate Body of the Dispute Settlement Body of the World Trade Organization has expressed the same idea as follows:

> The purpose of treaty interpretation under article 31 of the Vienna Convention is to ascertain the *common* intentions of the parties. These *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined "expectations" of *one* of the parties to a treaty.[1052]

(20) Since the declaration expresses only the unilateral intention of the author — or, if it has been approved by certain parties to the treaty, at best a shared intention[1053] — it

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[1048] This is the reason why the final phrase in paragraph 1 of guideline 4.7.1, recalling the title of article 31 of the Vienna Conventions, refers to "the general rule of interpretation of treaties", without going into detail on its complex ramifications.

[1049] *Yearbook* … 1999, vol. II, Part Two, pp. 97–103.

[1050] Emerich de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (Washington: Carnegie Institution of Washington, 1916), Part II, p. 462, para. 265.

[1051] *Yearbook ... 1964*, vol. I, 769th meeting, 17 July 1964.

[1052] Decision of 5 June 1998, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62-67-68/AB/R, para. 84 (emphasis in the original text) (also available on the World Trade Organization website: http://www.wto.org/english/tratop_e/dispu_e/ab_reports_e.htm).

[1053] Monika Heymann has explained in this regard: "*Wird eine einfache Interpretationserklärung nur von einem Teil der Vertragsparteien angenommen, ist die* interprétation partagée *kein selbständiger Auslegungsfaktor im Sinne der [Wiener Vertragsrechtskonvention]. Dies liegt daran, dass bei der Auslegung eines Vertrags die Absichten aller Vertragsparteien zu berücksichtigen sind und die interprétation partagée immer nur den Willen einer mehr oder weniger großen Gruppe von Vertragsparteien zum Ausdruck bringt" Einseitige Interpretationserklärungen zu multilateralen Verträgen* (*op. cit.*, footnote 423 above, p. 135, footnote omitted). [If a mere interpretative declaration is accepted by only some of the contracting parties, the shared interpretation does not constitute an autonomous factor in interpretation within the meaning of the Vienna Convention on the Law of Treaties. This is because, when the treaty is interpreted, the intentions of the parties must be taken certainly cannot be given an objective value that is applicable *erga omnes*, much less the value of an authentic interpretation accepted by all parties.[1054] Although it does not determine the meaning to be given to the terms of the treaty, it nonetheless affects the process of interpretation to some extent.

(21) However, it is difficult to determine precisely on what basis an interpretative declaration would be considered an element in interpretation under articles 31 and 32 of the Vienna Conventions. Already Waldock, in a particularly prudent manner, had left open a certain doubt on the question:

> Statements of interpretation were not dealt with by the Commission in the present action for the simple reason that they are not reservations and appear to concern the interpretation rather than the conclusion of treaties. In short, they appear rather to fall under articles 69–71. These articles provide that the "context of the treaty, for the purposes of its interpretation", is to be understood as comprising "any agreement or instrument related to the treaty and reached or drawn up in connection with its conclusion" (art. 69, para. 2); that "any agreement between the parties regarding the interpretation of the treaty" and "any subsequent practice in the application of the treaty which clearly establishes the understanding of all the parties regarding its interpretation" are to be taken into account "together with the context" of the treaty for the purposes of its interpretation (art. 69, para. 3); that as "further means of interpretation" recourse may be had, *inter alia*, to the "preparatory work of the treaty and the circumstances of its conclusion" (art. 70); and that a meaning other than its ordinary meaning may be given to a term if it is established conclusively that the parties intended the term to have that special meaning. Any of these provisions may come into play in appreciating the legal effect of an interpretative declaration in a given case. ... In the view of the Special Rapporteur the Commission was entirely correct in deciding that the matter belongs under articles 69–71 rather than under the present section.[1055]

(22) Whether interpretative declarations are regarded as one of the elements to be taken into consideration for the interpretation of the treaty essentially depends on the context of the declaration and the assent of the other States parties. But it is particularly noteworthy that, in 1966, the Special Rapporteur very clearly refused to include unilateral declarations or agreements *inter partes* in the "context", even though the United States had suggested doing so by means of an amendment. The Special Rapporteur explained that only a degree of assent by the other parties to the treaty would have made it possible to include declarations or agreements *inter partes* in the interpretative context:

> As to the substance of paragraph 2, ... the suggestion of the United States Government that it should be made clear whether the "context" includes (1) a unilateral document and (2) a document on which several but not all of the parties to a multilateral instrument have agreed raises problems both of substance and of drafting which the Commission was aware of in 1964 but did not find it easy to solve at the sixteenth session. ... But it would seem clear on principle that a unilateral document cannot be regarded as part of the "context" for the purpose of interpreting a treaty, unless its relevance for the interpretation of the treaty or for determining the conditions of the particular State's acceptance of the treaty is

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into account while the shared interpretation expresses only the will of a more or less large group of the contracting parties.]

[1054] On this case, see guideline 4.7.3 and the commentary thereto below.

[1055] Fourth report on the law of treaties, A/CN.4/177 and Add.1 and 2, *Yearbook ... 1965*, vol. II, para. 2 (observations of the Special Rapporteur on draft articles 18, 19 and 20 (footnotes omitted)).

> acquiesced in by the other parties. Similarly, in the case of a document emanating from a group of the parties to a multilateral treaty, principle would seem to indicate that the relevance of the document in connection with the treaty must be acquiesced in by the other parties. Whether a "unilateral" or a "group" document forms part of the context depends on the particular circumstances of each case, and the Special Rapporteur does not think it advisable that the Commission should try to do more than state the essential point of the principle – the need for express or implied assent.[1056]

(23) Mr. Sapienza also concludes that interpretative declarations which have not been approved by the other parties do not fall under article 31, paragraph 2 (b), of the Vienna Conventions:

> *In primo luogo, ci si potrebbe chiedere quale significato debba attribuirsi all'espressione* "accepté par les autres parties en tant qu'instrument ayant rapport au traité". *Deve intendersi nel senso che l'assenso delle altre parti debba limitarsi al fatto che lo strumento in questione possa ritenersi relativo al trattato o, invece, nel senso che debba estendersi anche al contenuto dell'interpretazione? Ci pare che l'alternativa non abbia, in realtà, motivo di porsi, dato che il paragrafo 2 afferma che dei documenti in questione si terrà conto "ai fini dell'interpretazione". Dunque, l'accettazione delle altre parti nei confronti degli strumenti di cui alla lettera (b) non potrà che essere un consenso a che l'interpretazione contenuta nella dichiarazione venga utilizzata nella ricostruzione del contenuto normativo delle disposizioni convenzionali cui afferisce, anche nei confronti degli altri Stati.*[1057]
>
> [First, it could be asked what meaning should be given to the phrase "accepted by the other parties as an instrument related to the treaty". Does it mean that the assent of the other parties should be limited to the fact that the instrument in question could be considered to be related to the treaty or, rather, should it also cover the content of the interpretation? It seems that, in fact, the alternative should not be considered, since paragraph 2 states that the instruments in question will be taken into account "for the purpose of the interpretation". Consequently, acceptance by the other parties of the instruments referred to in subparagraph (b) can only be consent to the use of the interpretation contained in the declaration for the reconstruction of the normative content of the treaty provisions in question, even with respect to other States.]

(24) Nonetheless, although at first glance such interpretative declarations do not seem to fall under articles 31 and 32 of the Vienna Conventions, they still constitute the (unilateral) expression of the intention of one of the parties to the treaty and may, on that basis, play a role in the process of interpretation.

(25) In its advisory opinion on the *International status of South-West Africa*, the International Court of Justice noted, on the subject of the declarations of the Union of South Africa regarding its international obligations under the Mandate:

> These declarations constitute recognition by the Union Government of the continuance of its obligations under the Mandate and not a mere indication of the future conduct of that Government. Interpretations placed upon legal instruments by

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[1056] Sir Humphrey Waldock, sixth report on the law of treaties, *Yearbook ... 1966*, vol. II, p. 98, para. 16.

[1057] Rosario Sapienza, *Dichiarazioni interpretative unilaterali e trattati internazionali* (Milan: Giuffrè, 1996), pp. 239–240. See also Sir Robert Jennings and Sir Arthur Watts, eds., *Oppenheim's International Law*, vol. I, 1992, p. 1268 ("An interpretation agreed between some only of the parties to a multilateral treaty may, however, not be conclusive, since the interests and intentions of the other parties may have to be taken into consideration").

> the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument. In this case the declarations of the Union of South Africa support the conclusions already reached by the Court.[1058]

(26) The Court thus specified that declarations by States relating to their international obligations have "probative value" for the interpretation of the terms of the legal instruments to which they relate, but that they corroborate or "support" an interpretation that has already been determined by other methods. In this sense, an interpretative declaration may therefore confirm an interpretation that is based on the objective factors listed in articles 31 and 32 of the Vienna Conventions.

(27) In the case concerning *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*,[1059] the Court was again seised with the question as to the value of an interpretative declaration. In signing and ratifying the United Nations Convention on the Law of the Sea, Romania formulated the following interpretative declaration:

> "Romania states that according to the requirements of equity as it results from Articles 74 and 83 of the Convention on the Law of the Sea, the uninhabited islands without economic life can in no way affect the delimitation of the maritime spaces belonging to the mainland coasts of the coastal States."[1060]

In its Judgment, however, the Court paid little attention to the Romanian declaration, merely noting the following:

> "Finally, regarding Romania's declaration [...], the Court observes that under Article 310 of the United Nations Convention on the Law of the Sea, a State is not precluded from making declarations and statements when signing, ratifying or acceding to the Convention, provided these do not purport to exclude or modify the legal effect of the provisions of the United Nations Convention on the Law of the Sea in their application to the State which has made a declaration or statement. The Court will therefore apply the relevant provisions of United Nations Convention on the Law of the Sea as interpreted in its jurisprudence, in accordance with Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969. Romania's declaration as such has no bearing on the Court's interpretation."[1061]

(28) The wording is rather peremptory and seems to cast serious doubt on the utility of interpretative declarations. It seems to suggest that the declaration has "no bearing" on the interpretation of the provisions of the Montego Bay Convention that the Court has been asked to give. However, the use of the expression "as such" allows one to shade this radical observation: while the Court does not consider itself bound by the unilateral interpretation proposed by Romania, that does not preclude the unilateral interpretation from having an effect as a means of proof or a piece of information that might corroborate the Court's interpretation "in accordance with Article 31 of the Vienna Convention on the Law of Treaties".

(29) The Strasbourg Court took a similar approach. After the European Commission of Human Rights, which had already affirmed that an interpretative declaration "may be taken

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[1058] *International status of South-West Africa, Advisory opinion of 11 July 1950, I.C.J. Reports 1950*, pp. 135–136.

[1059] Judgment of 3 February 2009, *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, available on the Court website (http://www.icj-cij.org/).

[1060] *Multilateral Treaties* ..., footnote 341 above, chap. XXI.6.

[1061] Judgment of 3 February 2009, see footnote 1059 above, para. 42.

into account when an article of the Convention is being interpreted"[1062] the Court chose to take the same approach in the case of *Krombach v. France*: interpretative declarations may confirm an interpretation derived on the basis of sound practice. Thus, in order to respond to the question of knowing whether the higher court in a criminal case may be limited to a review of points of law, the Court first examined State practice, then its own jurisprudence, in the matter and ultimately cited a French interpretative declaration:

> "The Court reiterates that the Contracting States dispose in principle of a wide margin of appreciation to determine how the right secured by Article 2 of Protocol No. 7 to the Convention is to be exercised. Thus, the review by a higher court of a conviction or sentence may concern both points of fact and points of law or be confined solely to points of law. Furthermore, in certain countries, a defendant wishing to appeal may sometimes be required to seek permission to do so. However, any restrictions contained in domestic legislation on the right to a review mentioned in that provision must, by analogy with the right of access to a court embodied in Article 6 § 1 of the Convention, pursue a legitimate aim and not infringe the very essence of that right (see *Haser v. Switzerland* (dec.), No. 33050/96, 27 April 2000, unreported). This rule is in itself consistent with the exception authorized by paragraph 2 of Article 2 and is backed up by the French declaration regarding the interpretation of the Article, which reads: '... in accordance with the meaning of Article 2, paragraph 1, the review by a higher court may be limited to a control of the application of the law, such as an appeal to the Supreme Court'."[1063]

(30) States also put forward their interpretative declarations in these minor tones. Thus, the argument by the Agent for the United States in the case concerning *Legality of Use of Force (Yugoslavia v. United States of America)* was tangentially based on the interpretative declaration made by the United States in order to demonstrate that the specific *mens rea* is an essential element of the qualification of genocide:

> "[T]he need for a demonstration in such circumstances of the specific intent required by the Convention was made abundantly clear by the United States Understanding at the time of the United States ratification of the Convention. That Understanding provided that 'acts in the course of armed conflicts committed without the specific intent required by Article II are not sufficient to constitute genocide as defined by this Convention'. The Socialist Federal Republic of Yugoslavia did not object to this Understanding, and the Applicant made no attempt here to take issue with it."[1064]

(31) It is therefore clear from practice and doctrinal analyses that interpretative declarations come into play only as an auxiliary or complementary means of interpretation corroborating a meaning given by the terms of the treaty, considered in the light of its object and purpose. As such, they do not produce an autonomous effect: when they have an effect at all, interpretative declarations are associated with another instrument of interpretation, which they usually uphold.

(32) The interpreter can thus rely on interpretative declarations to confirm his conclusions regarding the interpretation of a treaty or a provision of it. Interpretative declarations constitute the expression of a subjective element of interpretation — the intention of one of the States parties — and, as such, may confirm "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The phrase "as appropriate" that appears in both the first and second paragraphs of guideline 4.7.1 is meant

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[1062] See footnote 1031 above.

[1063] European Court of Human Rights, Judgement of 13 February 2001, *Krombach v. France*, application No. 29731/9, para. 96.

[1064] Report 1999/35, 12 May 1999, p. 9 (Mr. Andrews).

to emphasize that interpretative declarations (and reactions to them) are taken into consideration on the basis of individual circumstances.

(33) In that same vein, and as guideline 4.7.1, paragraph 2 stresses, the reactions (approval or opposition) that may have been expressed with regard to the interpretative declaration by the other parties — all of them potential interpreters of the treaty as well — should also be taken into consideration. An interpretative declaration that was approved by one or more States certainly has greater value as evidence of the intention of the parties than an interpretative declaration to which there has been an opposition.[1065]

4.7.2 Effect of the modification or the withdrawal of an interpretative declaration in respect of its author

The modification or the withdrawal of an interpretative declaration may not produce the effects provided for in draft guideline 4.7.1 to the extent that other contracting States or contracting organizations have relied upon the initial declaration.

Commentary

(1) Despite the auxiliary role to which interpretative declarations are confined under guideline 4.7.1, it should be recalled that they are unilateral declarations expressing their author's intention to accept a given interpretation of the provisions of the treaty. Accordingly, although the declaration in itself does not create rights and obligations for its author or for the other parties to the treaty, it may prevent its author from taking a position contrary to that expressed in its declaration. It does not matter whether or not this phenomenon is called estoppel;[1066] in any case it is a corollary of the principle of good faith,[1067] in the sense that, in its international relations, a State cannot "blow hot and cold".

[1065] Donald M. McRae, footnote 1033 above, pp. 169–170.

[1066] As Judge Alfaro explained in the important separate opinion he attached to the Court's second judgment in the *Temple of Preah Vihear* (*Cambodia v. Thailand*) case, "whatever term or terms be employed to designate this principle such as it has been applied in the international sphere, its substance is always the same: inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible (*allegans contraria non audiendus est*). Its purpose is always the same: a State must not be permitted to benefit by its own inconsistency to the prejudice of another State (*nemo potest mutare consiliuim suum in alterius injuriam*). ... Finally, the legal effect of the principle is always the same: the party which by its recognition, its representation, its declaration, its conduct or its silence has maintained an attitude manifestly contrary to the right it is claiming before an international tribunal is precluded from claiming that right (*venire contra factum proprium non valet*)" (*I.C.J. Reports 1962*, p. 40). See also the Permanent Court of International Justice, Judgment of 12 July 1920, *Serbian loans, Series A, No. 20*, pp. 38–39; ICJ Judgments of 20 February 1969 (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), I.C.J. Reports 1969*, p. 26, paragraph 30; 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), *Jurisdiction and Admissibility*, *I.C.J. Reports 1984*, p. 415, para. 51; or 13 September 1990, *Land, Island and Maritime Frontier Dispute* (*El Salvador/Honduras: Nicaragua intervening*)), *Request by Nicaragua for Permission to Intervene*, *I.C.J. Reports 1990*, p. 118, para. 63.

[1067] See the Judgment of 12 October 1984, *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (*Canada/United States of America*), *I.C.J. Reports 1984*, p. 305, paragraph 130. The doctrine is in agreement on this point. Thus, as Derek Bowett explained more than a half-century ago, the *raison d'être* of estoppel lies in the principle of good faith: "The basis of the rule is the general principle of good faith and as such finds a place in many systems of law" ("Estoppel Before International Tribunals and its Relation to Acquiescence", *British Year Book of International Law*, vol. 33 (1957), p. 176 (footnotes omitted)). See also Alain Pellet and James Crawford, "Aspects des modes continentaux et anglo-saxons de plaidoiries devant la C.I.J.", in *International Law between*

It cannot declare that it interprets a given provision of the treaty in one way and then take the opposite position before a judge or international arbitrator, at least if the other parties have relied on it. As indicated by principle 10 of the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, adopted in 2006 by the International Law Commission:

> "A unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily. In assessing whether a revocation would be arbitrary, consideration should be given to:
>
> [...] (b) the extent to which those to whom the obligations are owed have relied on such obligations; ..."[1068]

(2) It cannot be deduced from the above that the author of an interpretative declaration is bound by the interpretation it puts forward – which might ultimately prove unfounded. The validity of the interpretation depends on other circumstances and can be assessed only under the rules governing the interpretation process. In this context, Bowett presents a sound analysis:

> "The estoppel rests on the representation of fact, whereas the conduct of the parties in construing their respective rights and duties does not appear as a representation of fact so much as a representation of law. The interpretation of rights and duties of parties to a treaty, however, should lie ultimately with an impartial international tribunal and it would be wrong to allow the conduct of the parties in interpreting these rights and duties to become a binding interpretation on them."[1069]

(3) It should be recalled that under draft guidelines 2.4.9 (Modification of an interpretative declaration)[1070] and 2.5.12 (Withdrawal of an interpretative declaration),[1071] the author of an interpretative declaration is free to modify or withdraw it at any time. Depending on the circumstances, the withdrawal or modification of an interpretative declaration may be of some relevance to the interpretation of the treaty to which it relates. However, the Commission decided not to make express mention of these two provisions because they relate to procedural rules, whereas guideline 4.7.2 is included in the section of the Guide to Practice concerning the effects of interpretative declarations.

(4) Like the author of an interpretative declaration, any State or international organization that has approved this declaration is bound by the same principles *vis-à-vis* the

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Universalism and Fragmentation-Festschrift in Honour of Gerhard Hafner (Leiden/Boston: Nijhoff, 2008), pp. 831–867.

[1068] See the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, adopted in 2006 by the International Law Commission, principle 10, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), p. 369. According to principle 10, the two other factors to be taken into account when assessing the arbitrary nature of a revocation are: "(a) Any specific terms of the declaration relating to revocation" and "(c) The extent to which there has been a fundamental change in the circumstances" (*ibid.*, p. 380). *Mutatis mutandis*, these two factors may also be relevant to the implementation of guideline 4.7.2.

[1069] Bowett, footnote 1067 above, p. 189. See also McRae, footnote 1033 above, p. 168.

[1070] This guideline reads as follows: "Unless the treaty provides that an interpretative declaration may be made or modified only at specified times, an interpretative declaration may be modified at any time" (*Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), pp. 275–277).

[1071] This guideline reads as follows: "An interpretative declaration may be withdrawn at any time, following the same procedure applicable to its formulation, by the authorities competent for that purpose" (*ibid., Fifty-ninth Session, Supplement No. 10* (A/59/10), pp. 278–280).

author of the declaration; it may modify or withdraw its approval at any time, provided that the author of the declaration (or third parties) have not relied on it.

(5) Moreover, despite its limited binding force, and since an interpretative declaration might constitute the basis for agreement on the interpretation of the treaty, it could also preclude such an agreement from being made.[1072] In this connection, Professor McRae noted:

> *"The 'mere interpretative declaration' serves notice of the position to be taken by the declaring State and may herald a potential dispute between that State and other contracting parties."*[1073]

4.7.3 Effect of an interpretative declaration approved by all the contracting States and contracting organizations

An interpretative declaration that has been approved by all the contracting States and contracting organizations may constitute an agreement regarding the interpretation of the treaty.

Commentary

(1) Acquiescence to an interpretative declaration by all the other parties to the treaty, however, radically alters the situation. Thus, in the International Law Commission, Waldock recalled that the Commission

> "agreed that the relevance of statements of the parties for purposes of interpretation depended on whether they constituted an indication of common agreement by the parties. Acquiescence by the other parties was essential."[1074]

(2) Unanimous agreement by all the parties therefore constitutes a genuine interpretative agreement which represents the will of the "masters of the treaty" and thus an authentic interpretation.[1075] One example is the unanimous approval by the contracting States to the 1928 Kellogg-Briand Pact of the interpretative declaration of the United States of America concerning the right to self-defence.[1076]

(3) In this case, it is just as difficult to determine whether the interpretative agreement is part of the internal context (article 31, paragraph 2, of the Vienna Conventions) or the external context (art. 31, para. 3) of the treaty.[1077] The fact is that everything depends on the circumstances in which the declaration was formulated and in which it was approved by the other parties. Indeed, in a case where a declaration is made before the signature of the treaty and approved when (or before) all the parties have expressed their consent to be bound by it, the declaration and its unanimous approval, combined, give the appearance of an interpretative agreement that could be construed as being an "agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty" within the meaning of article 31, paragraph 2 (a) or as "any instrument which was

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[1072] M. Heymann, footnote 423 above, p. 129.

[1073] D.M. McRae, footnote 1033 above, pp. 160–161 (footnotes omitted).

[1074] *Yearbook ... 1966*, vol. I, Part One, 829th meeting, 12 January 1966, p. 47, para. 53. See also R. Kolb, *Interpretation et création du droit international* (Brussels: Bruylant, 2006), p. 609.

[1075] See footnote 1035 above. See also M. Heymann, footnote 423 above, pp. 130–135; I. Voïcu, *De l'interprétation authentique des traités internationaux*, (Paris: Pedone, 1968), p. 134; or M. Herdegen, "Interpretation in International Law", *Max Planck Encyclopedia of Public International Law*, http://www.mpepil.com/, para. 34.

[1076] *American Journal of International Law (A.J.I.L.) Supplement*, vol. 23, 1929, pp. 1–13.

[1077] See above, para. (21) of the commentary to guideline 4.7.1.

made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty" within the meaning of paragraph 2 (b) of the same article. If, however, the interpretative agreement is reached only once the treaty has been concluded, a question might arise as to whether it is merely a "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" within the meaning of article 31, paragraph 3 (b) or if, by virtue of their formal nature, the declaration and unanimous approval combined constitute a veritable "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" (art. 3 (a)).[1078]

(4) Without really coming to a decision on the matter, the Commission wrote in its commentary to article 27 of its 1966 draft articles (which became article 31, paragraph 3 (a) of the 1969 Convention):

> "A question of fact may sometimes arise as to whether an understanding reached during the negotiations concerning the meaning of a provision was or was not intended to constitute an agreed basis for its interpretation. But it is well settled that when an agreement as to the interpretation of a provision is established as having been reached before or at the time of the conclusion of the treaty, it is to be regarded as forming part of the treaty. Thus, in the *Ambatielos* case the Court said: '... the provisions of the Declaration are in the nature of an interpretation clause, and, as such, should be regarded as an integral part of the Treaty ...' Similarly, an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation."[1079]

(5) The fact remains, however, depending on the circumstances — the lack of an automatic effect being indicated by the verb "may" in guideline 4.7.3 — the unanimous approval by the parties of an interpretative declaration made by one of them may constitute an agreement, and an agreement among the parties as to the interpretation of the treaty must be taken into consideration when interpreting the provisions to which it relates.

5. Reservations, acceptances of and objections to reservations, and interpretative declarations in the case of succession of States

Commentary

(1) As the title suggests, Part 5 of the Guide to Practice deals with reservations, acceptances of and objections to reservations and interpretative declarations in the case of succession of States. Part 5 is organized in four sections entitled as follows:

- Reservations and succession of States (5.1)
- Objections to reservations and succession of States (5.2)
- Acceptances of reservations and succession of States (5.3)
- Interpretative declarations and succession of States (5.4)

(2) The inclusion of guidelines in this area in the Guide to Practice is all the more important given that:

[1078] In this regard, see, in particular, M. Heymann, footnote 423 above, p. 130.

[1079] *Yearbook ... 1966*, vol. II, p. 221, para. (14) of the commentary (footnotes omitted).

- The 1969 and 1986 Vienna Conventions have no provisions on this subject except a safeguard clause, which, by definition, gives no indication as to the applicable rules[1080]

- The 1978 Vienna Convention on Succession of States in respect of Treaties contains only one provision on reservations, namely article 20, which is worded as follows:

> Article 20. Reservations
>
> 1. When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession under article 17 or 18, it shall be considered as maintaining any reservation to that treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates unless, when making the notification of succession, it expresses a contrary intention or formulates a reservation which relates to the same subject matter as that reservation.
>
> 2. When making a notification of succession establishing its status as a party or as a contracting State to a multilateral treaty under article 17 or 18, a newly independent State may formulate a reservation unless the reservation is one the formulation of which would be excluded by the provisions of subparagraph (a), (b) or (c) of article 19 of the Vienna Convention on the Law of Treaties.
>
> 3. When a newly independent State formulates a reservation in conformity with paragraph 2, the rules set out in articles 20 to 23 of the Vienna Convention on the Law of Treaties apply in respect of that reservation.

(3) Article 20 of the 1978 Vienna Convention scarcely deals with, much less solves, potential problems arising in connection with reservations in the case of succession of States.[1081] First, it should be noted that the article is contained in Part III of the Convention, which deals with "newly independent States", within the meaning of article 2, paragraph 1 (f), of the Convention, that is, States arising from decolonization,[1082] whereas the question of the rules applicable in the case of the succession of States in respect of part of a territory, the uniting of States or the separation of States is left aside completely. Secondly, while article 20, paragraph 2, provides for the option of formulating new reservations by the newly independent State and while the effect of paragraph 3 is that third States may formulate objections in that event, it fails to stipulate whether the latter can object to a reservation being maintained. Lastly, article 20 of the 1978 Vienna Convention makes no reference whatever to succession in respect of objections to reservations — whereas the initial proposals of Waldock did deal with this point[1083] — and the reasons for this omission are not clear.[1084]

[1080] Article 73 of the 1969 Vienna Convention reads: "The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States ... ." A similar safeguard clause appears in article 74, para. 1, of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

[1081] See in this regard the observations contained in the first report on reservations *Yearbook of the International Law Commission, 1995*, vol. II, Part One, document A/CN.4/470, pp. 147–148, paras. 132–135. See also pp. 136–137, paras. 62–71, and the second report, *Yearbook ... 1996*, vol. II, Part One, p. 50, para. 46, as well as the memorandum by the Secretariat (A/CN.4/616), p. 3, paras. 1 and 2.

[1082] Under article 2, para. 1 (f), of the 1978 Vienna Convention, "'newly independent State' means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible".

[1083] See para. (3) of the commentary to guideline 5.1.1 below.

[1084] P.-H. Imbert, footnote 522 above, pp. 318–322.

(4) The result is that while some of the guidelines of Part 5 reflect the state of positive international law on the subject, others represent the progressive development of international law or are intended to offer logical solutions to problems to which neither the 1978 Vienna Convention nor the relevant practice seems to have provided clear answers thus far. In any event, as is generally the case, it is often difficult if not impossible to make a clear distinction between proposals that come under the heading of codification *stricto sensu*, on the one hand, and proposals aimed at progressive development, on the other.

(5) That said, this Part of the Guide to Practice is based on the rules and principles set out in the 1978 Vienna Convention on the Succession of States in respect of Treaties. In particular, it relies on the definition of succession of States given in that instrument.[1085] More generally, the guidelines of this part of the Guide use the same terminology as the 1978 Vienna Convention, attribute the same meaning to the terms and expressions used in that Convention and defined in its article 2 and are based, where applicable, on the distinctions made in that instrument among the various forms of succession of States, namely:

- "Succession in respect of part of territory" (art. 15)
- "Newly independent States" (art. 2, para. 1 (f) and arts. 16 et seq.)
- "Newly independent States formed from two or more territories" (art. 30)
- "Uniting of States" (arts. 31–33) and
- "Separation of parts of a State" (arts. 34–37)

(6) Moreover, Part 5 of the Guide to Practice starts from the premise that the question of a State's succession to a treaty has been settled as a preliminary issue. This is the implication of the word "when", which begins several of the guidelines of this part and refers to concepts that are considered as settled and need not be revisited by the Commission in dealing with this subject. By this logic, then, the point of departure is that a successor State has the status of a contracting State or State party to a treaty as a consequence of the succession of States, not because it has expressed its consent to be bound by the treaty within the meaning of article 11 of the Vienna Convention on the Law of Treaties of 23 May 1969.[1086]

(7) Lastly, like the 1978 Vienna Convention,[1087] the guidelines of Part 5 of the Guide to Practice concern only reservations formulated by a predecessor State that was a contracting State or State party to the treaty in question as of the date of the succession of States. They do not deal with reservations formulated by a predecessor State that had only signed the treaty subject to ratification, acceptance or approval, without having completed the relevant action prior to the date of the succession of States. Reservations of this second kind cannot be considered as being maintained by the successor State because they did not, at the date of the succession of States, produce any legal effects, not having been formally confirmed

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[1085] Art. 2, para. 1 (b): "'Succession of States' means the replacement of one State by another in the responsibility for the international relations of territory"; see also art. 2, para. 1 (a), of the 8 April 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts, or art. 2 (a) of the articles on the nationality of natural persons in relation to the succession of States annexed to General Assembly resolution 55/153 of 12 December 2000.

[1086] "The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed."

[1087] See article 20.

by the State in question when expressing its consent to be bound by the treaty, as required by article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions.[1088]

5.1 Reservations and succession of States

5.1.1 [5.1] Newly independent States

1. When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession, it shall be considered as maintaining any reservation to that treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates unless, when making the notification of succession, it expresses a contrary intention or formulates a reservation which relates to the same subject matter as that reservation.

2. When making a notification of succession establishing its status as a party or as a contracting State to a multilateral treaty, a newly independent State may formulate a reservation unless the reservation is one the formulation of which would be excluded by the provisions of subparagraph (a), (b) or (c) of guideline 3.1 of the Guide to Practice.

3. When a newly independent State formulates a reservation in conformity with paragraph 2, the relevant rules set out in Part 2 (Procedure) of the Guide to Practice apply in respect of that reservation.

4. For the purposes of this Part of the Guide to Practice, "newly independent State" means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible.

Commentary

(1) Guideline 5.1.1 reproduces paragraphs 1 to 3 of article 20 of the 1978 Vienna Convention. This provision relates only to a "newly independent State" within the meaning of article 2, paragraph 1 (f), of the Convention, namely a State that gains independence at the end of a decolonization process.[1089] The Commission decided to place this draft

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[1088] See guideline 2.2.1 and the commentary thereto in *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 465–472.

[1089] See above, para. (2) of the general commentary to Part 5 of the Guide to Practice. See also the memorandum by the Secretariat (A/CN.4/616; see footnote 1081 above), para. 2. This limitation of the scope of article 20 to newly independent States is confirmed by the fact that at the 1977–1978 Vienna Conference, it was suggested that, with respect to other cases of succession, a provision regulating the issue of reservations should be included. The delegation of India, for example, pointed out that there was a gap in the Convention in that respect and, accordingly, a need to add an article on reservations to the part of the Convention which dealt with the uniting and separation of States (A/CONF.80/16, 28th meeting, para. 17). Meanwhile, the delegation of the Federal Republic of Germany proposed a new article 36 *bis* (A/CONF.80/16/Add.1, 43rd meeting, paras. 9–12) that provided in particular for the transposition, to the cases of succession referred to in part IV of the Convention, of the rules on reservations applicable to newly independent States:

> 1. When under articles 30, 31, 33 and 35 a treaty continues in force for a successor State or a successor State participates otherwise in a treaty not yet in force for the predecessor State, the successor State shall be considered as maintaining:
>
> (a) Any reservation to that treaty made by the predecessor State in regard to the territory to which the succession of States relates;
>
> ...
>
> 2. Notwithstanding paragraph 1, the successor State may however:

guideline first in Part 5 of the Guide to Practice, since it is based on the only provision of the 1978 Vienna Convention which deals with reservations in relation to succession of States.

(2) Paragraph 4 of this guideline, which has no equivalent in article 20 of the 1978 Convention, reproduces the definition of "newly independent State" set out in article 2, paragraph 1 (f), of that Convention. The definition was reproduced in the Guide to Practice to avoid any misunderstanding regarding the use of this expression, given the importance of the distinction between successor States with the status of newly independent States and other successor States in dealing with legal issues concerning reservations, objections to reservations, acceptances of reservations and interpretative declarations in relation to the succession of States. This limitation of the scope of guideline 5.11 is reflected in its title ("Newly independent States").

(3) The origin of the rules set out in article 20 of the 1978 Convention and reproduced in this guideline dates back to a proposal put forward in the third report of Waldock.[1090] The report contained a draft article 9 on "Succession in respect of reservations to multilateral treaties", its purpose being to determine the position of the successor State in regard to reservations, acceptances and objections. After enunciating certain "logical principles" and noting that the — still developing — practice of depositaries was not wholly consistent with them, the Special Rapporteur concluded "that a flexible and pragmatic approach to the problem of succession in respect of reservations is to be preferred".[1091] Concerning reservations, Waldock proposed that rules should be adopted to reflect:

- A presumption in favour of succession to the reservations of the predecessor State unless the successor State has expressed a contrary intention or unless, by reason of its object and purpose, the reservation is appropriate only to the predecessor State (art. 9, para. 1) and

- The possibility for the successor State to formulate new reservations, in which case: (i) the successor State is considered to have withdrawn any different reservations made by the predecessor State; and (ii) the provisions of the treaty itself and of the 1969 Vienna Convention apply to the reservations of the successor State (para. 2).[1092]

(4) Paragraph 1 of guideline 5.1.1 reproduces the rebuttable presumption enunciated in article 20, paragraph 1, of the 1978 Vienna Convention that a newly independent State shall be considered as maintaining the reservations formulated by the predecessor State. While article 20, paragraph 1, of the Convention makes reference in this context to a newly independent State which establishes its status as a contracting State or a party to a multilateral treaty through a notification of succession under article 17 or 18 of this Convention,[1093] reference to these articles was omitted in the text of the guideline. Such a

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(a) Withdraw or modify, wholly or partly, the reservation (paragraph 1 subparagraph (a)) or formulate a new reservation, subject to the conditions laid down in the treaty and the rules set out in articles 19, 20, 21, 22 and 23 of the Vienna Convention on the Law of Treaties ...

(A/CONF.80/30, para. 118, reproduced in *Documents of the Conference* (A/CONF.80/16/Add.2)).

[1090] *Yearbook ... 1970*, vol. II, document A/CN.4/224 and Add.1, p. 25.

[1091] *Ibid*., pp. 47 and 50, commentary, paras. (2) and (11).

[1092] *Ibid*., p. 47.

[1093] These provisions read as follows:

Article 17 – Participation in treaties in force at the date of the succession of States

1. Subject to paragraphs 2 and 3, a newly independent State may, by a notification of succession, establish its status as a party to any multilateral treaty which at the date of the

reference seemed unnecessary to the Commission given that the basic principle — the *modus operandi* — of the present report consists in postulating that the relevant rules of the 1978 Convention apply.

(5) First proposed by Waldock in his third report,[1094] this presumption was then endorsed by the Commission, despite the proposals put forward subsequently by some States (Australia, Belgium, Canada and Poland) to reverse the presumption; the proposals in question on this subject were neither followed up by the second Special Rapporteur, Sir Francis Vallat,[1095] nor subscribed to by the Commission.[1096]

(6) The presumption in favour of the maintenance of the predecessor State's reservations gave rise to little debate at the United Nations Conference on Succession of States in Respect of Treaties, which met in Vienna from 4 April to 6 May 1977 and from 31 July to 23 August 1978. Even though some States again proposed that the presumption should be reversed having regard to the "clean slate" principle,[1097] the Committee of the

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succession of States was in force in respect of the territory to which the succession of States relates.

2. Paragraph 1 does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the newly independent State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

3. When, under the terms of the treaty or by reason of the limited number of the negotiating States and the object and purpose of the treaty, the participation of any other State in the treaty must be considered as requiring the consent of all the parties, the newly independent State may establish its status as a party to the treaty only with such consent.

Article 18 – Participation in treaties not in force at the date of the succession of States

1. Subject to paragraphs 3 and 4, a newly independent State may, by a notification of succession, establish its status as a contracting State to a multilateral treaty which is not in force if at the date of the succession of States the predecessor State was a contracting State in respect of the territory to which that succession of States relates.

2. Subject to paragraphs 3 and 4, a newly independent State may, by a notification of succession, establish its status as a party to a multilateral treaty which enters into force after the date of the succession of States if at the date of the succession of States the predecessor State was a contracting State in respect of the territory to which that succession of States relates.

3. Paragraphs 1 and 2 do not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the newly independent State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

4. When, under the terms of the treaty or by reason of the limited number of the negotiating States and the object and purpose of the treaty, the participation of any other State in the treaty must be considered as requiring the consent of all the parties or of all the contracting States, the newly independent State may establish its status as a party or as a contracting State to the treaty only with such consent.

5. When a treaty provides that a specified number of contracting States shall be necessary for its entry into force, a newly independent State which establishes its status as a contracting State to the treaty under paragraph 1 shall be counted as a contracting State for the purpose of that provision unless a different intention appears from the treaty, or is otherwise established.

[1094] See above, para. (3) of the commentary to this guideline.

[1095] *Yearbook ... 1974*, vol. II, Part One, pp. 53–54, paras. 278–286.

[1096] *Ibid.*, vol. I, p. 117, and vol. II, Part One, p. 226.

[1097] Thus, for example, at the 1977–1978 Vienna Conference, the representative of the United Republic of Tanzania proposed an amendment reversing the presumption in favour of the maintenance of reservations formulated by the predecessor State and providing that the successor State was considered to have withdrawn reservations formulated by the predecessor State unless it expressed a

Whole, and then the Conference itself, approved the article on reservations (which had become article 20) as proposed by the International Law Commission, apart from some very minor drafting adjustments,[1098] and the presumption in favour of the maintenance of reservations was reflected in the final text of article 20 as adopted at the Vienna Conference.

(7) Such a presumption had already been proposed by Professor D.P. O'Connell, Rapporteur of the International Law Association on the topic "The Succession of New States to the Treaties and Certain Other Obligations of their Predecessors",[1099] one year before Waldock endorsed the concept.[1100] It is based on a concern for respecting the actual intention of the successor State by avoiding the creation of an irreversible situation: "if a presumption in favour of maintaining reservations were not to be made, the actual intention of the successor State might be irrevocably defeated; whereas, if it were made and the presumption did not correspond to the successor State's intention, the latter could always redress the matter by withdrawing the reservations".[1101]

(8) This solution is not self-evident and has been criticized in the literature. For example, according to Professor Pierre-Henri Imbert, "*il n'y au une raison pour penser que l'État n'étudiera pas le texte de la convention avec suffisamment de soin, pour savoir exactement les réserves qu'il veut maintenir, abandonner or formuler*" ["… there is no reason to think that the State would not study the text of the convention carefully enough to know exactly which reservations it wished to maintain, abandon or formulate"].[1102] This author cast doubt in particular on the assumption that the predecessor State's reservations would be "*nécessairement avantageuses pour l'État nouvellement indépendant… [L]es*

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contrary intention. (See *Official Records of the United Nations Conference on Succession of States in Respect of Treaties.*) *Vienna, 4 April–6 May 1977 and 31 July–23 August 1978*, vol. I, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* [1977 session], A/CONF.80/16 (United Nations publication, Sales No. 78.V.8), 28th meeting of the Committee of the Whole, para. 37; and A/CONF.80/14, para. 118 (c) (reproduced in *Documents of the Conference* (A/CONF.80/16/Add.2)). The representative of the United Republic of Tanzania, who expressed a preference for a "clean slate" in regard to reservations and pointed out that reservations formulated by the predecessor State were not necessarily in the interest of the successor State. (A/CONF.80/16, 27th meeting of the Committee of the Whole, para. 79). That amendment was rejected by 26 votes to 14, with 41 abstentions (A/CONF.80/16, 28th meeting of the Committee of the Whole, para. 41). A preference for the opposite presumption had also been expressed by other delegations; see vol. I, 28th meeting of the Committee of the Whole, para. 13 (Romania), para. 18 (India) and para. 33 (Kenya).

[1098] *Official Records of the United Nations Conference on Succession of States in Respect of Treaties, 4 April–6 May 1977 and 31 July–23 August 1978*, vol. I. *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* [resumed session 1978], A/CONF.80/16/Add.1 (United Nations publication, Sales No. E.78.V.8), 28th meeting of the Committee of the Whole, para. 41 (hereinafter A/CONF.80/16/Add.1).

[1099] "Additional point" No. 10 proposed by the Rapporteur of the Committee on "the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors", International Law Association, Buenos Aires Conference (1968), *Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors*, cited in Waldock's second report on succession in respect of treaties, *Yearbook … 1969*, vol. II (United Nations publication, Sales No. E.70.V.8), document A/CN.4/214 and Add.l-2, p. 49, para. 17: "A successor State can continue only the legal situation brought about as a result of its predecessor's signature or ratification. Since a reservation delimits that legal situation it follows that the treaty is succeeded to (if at all) with the reservation."

[1100] See above, para. (3) of the commentary to this guideline.

[1101] Third report (see footnote 1090 above), *Yearbook … 1970*, vol. II, p. 50; see also the elements of practice invoked in support of this solution, *ibid.*, pp. 47–49.

[1102] P.-H. Imbert, footnote 522 above, p. 309.

réserves constituant des dérogations, des limitations aux engagements de l'État, elles ne devraient pas pouvoir être présumées. Il serait au contraire normal de partir du principe que, en l'absence d'une déclaration de volonté formelle de sa part, un État est lié par l'ensemble du traité" ["necessarily advantageous to the newly independent State.... Since reservations constitute derogations from or limitations on a State's commitments, they should not be a matter of presumption. On the contrary, it makes more sense to assume that, in the absence of a formal statement of its intention, a State is bound by the treaty as a whole"].[1103]

(9) The commentary to draft article 19 as finally adopted by the Commission nonetheless puts forward some convincing arguments supporting the presumption in favour of the maintenance of reservations formulated by the predecessor State:

> "First, the presumption of an intention to maintain the reservations was indicated by the very concept of succession to the predecessor's treaties. Secondly, a State is in general not to be understood as having undertaken more onerous obligations unless it has unmistakably indicated an intention to do so; and to treat a newly independent State, on the basis of its mere silence, as having dropped its predecessor's reservations would be to impose upon it a more onerous obligation. Thirdly, if presumption in favour of maintaining reservations were not to be made, the actual intention of the newly independent State might be irrevocably defeated; whereas, if it were made and the presumption did not correspond to the newly independent State's intention, the latter could always redress the matter by withdrawing the reservations.[1104]

(10) This seems to be the majority position in the literature, tending to support the presumption in favour of the maintenance of the predecessor State's reservations. Thus, D.P. O'Connell explains:

> Since a State which makes a reservation to a multilateral convention commits itself only to the convention as so reserved, its successor State cannot, logically, succeed to the convention without reservations. Should the reservation be unacceptable to it the appropriate procedure would be to ask the depositary to remove it and notify all parties accordingly.[1105]

Similarly, Professor Giorgio Gaja takes the view that:

> The opinion that the predecessor State's reservations are maintained is also based on the reasonable assumption that when a newly independent State elects to become a party to a treaty by means of a notification of succession, in principle it wants the treaty to continue to be applied to its territory in the same way as it did before independence.[1106]

[1103] *Ibid.*, p. 310. Imbert thus echoes the criticisms of some States (see footnote 1097 above) put forward at the 1977–1978 Vienna Conference, in particular by the representative of the United Republic of Tanzania, who expressed a preference for a "clean slate" in regard to reservations and pointed out that reservations formulated by the predecessor State were not necessarily in the interest of the successor State.

[1104] *Yearbook ... 1974*, vol. II, Part One, p. 226, para. (17) of the commentary to article 19.

[1105] Daniel Patrick O'Connell, *State Succession in Municipal Law and International Law*, Cambridge Studies in International and Comparative Law, No. 7, vol. II: International Relations (Cambridge: Cambridge University Press, 1967), p. 229 (footnote omitted).

[1106] Giorgio Gaja, "Reservations to treaties and the newly independent States", *Italian Yearbook of International Law*, 1975, p. 55. See also José María Ruda, "Reservations to treaties", *Recueil des cours: Collected Courses of The Hague Academy of International Law*, vol. 146 (1975-III), p. 206;

(11) This presumption is inferred logically, since succession to a treaty by a newly independent State, though voluntary, is a true succession that must be distinguished from accession. Because it is a succession, it seems reasonable to presume that treaty obligations are transmitted to the successor State as modified by the reservation formulated by the predecessor State.

(12) Nevertheless, as the last clause of paragraph 1 of this guideline shows, the presumption in favour of the newly independent State's maintenance of reservations formulated by the predecessor State is rebuttable. The presumption is reversed not only if a "contrary intention" is specifically expressed by the successor State when making the notification of succession, but also if that State formulates a reservation "which relates to the same subject matter" as the reservation formulated by the predecessor State. The exact wording of this second possibility was a subject of debate in the International Law Commission when this provision was being drafted.

(13) Waldock had proposed, in his third report, a different formulation that provided for the reversal of the presumption that the predecessor State's reservations were maintained if the successor State formulated "reservations different from those applicable at the date of succession".[1107] In its draft article 15 adopted on first reading in 1972, the Commission settled on a solution according to which the presumption that the predecessor State's reservations were maintained was reversed if the successor State formulated a new reservation "which relates to the same subject matter and is incompatible with [the reservation formulated by the predecessor State]".[1108] However, in his first report in 1974, Sir Francis Vallat, who had been appointed Special Rapporteur, endorsed a proposal made by Zambia and the United Kingdom and returned if not to the letter at least to the spirit of Waldock's proposal, though he described the change in question as minor, by removing the "incompatibility" test and providing only that a reservation of the predecessor State is not maintained if the successor State formulates a reservation relating to the same subject matter.[1109] Subject to a further drafting change, the Commission agreed with him on that point.[1110]

(14) It should be noted that the wording that was finally adopted by the Commission and reflected in the 1978 Vienna Convention has been criticized in the literature for omitting the test of "incompatibility" between a reservation formulated by the predecessor State and one formulated by the successor State.[1111] Nonetheless, in accordance with Sir Francis Vallat's proposal,[1112] the Commission finally deleted this requirement from the final draft article for pragmatic reasons, which it explained in the commentary to the corresponding article adopted on second reading in 1974:

> The test of incompatibility for which the paragraph provided might be difficult to apply and ... if the newly independent State were to formulate a reservation relating to the same subject-matter as that of the reservation made by the predecessor State, it could reasonably be presumed to intend to withdraw that reservation.[1113]

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also Padmanabhan K. Menon, "The newly independent States and succession in respect of treaties", *Korean Journal of Comparative Law*, vol. 18 (1990), p. 152.

[1107] Third report (see footnote 1090 above), *Yearbook ... 1970*, vol. II, p. 46.

[1108] *Yearbook ... 1972*, vol. II, p. 260.

[1109] *Yearbook ... 1974*, vol. II, (Part One), A/CN.4/278 and Add.1-6, particularly p. 54, para. 287.

[1110] *Ibid.*, p. 222 (art. 19).

[1111] See G. Gaja, *op. cit.*, footnote 1106, 1975, pp. 59–60.

[1112] First report, *Yearbook ... 1974*, vol. II, Part One, p. 54.

[1113] *Yearbook ... 1974*, vol. II, Part One, p. 226, para. (18) of the commentary to article 19.

(15) Paragraph 2 of guideline 5.1.1 reproduces article 20, paragraph 2, of the 1978 Vienna Convention. It recognizes that a newly independent State has the option of formulating a new reservation when making its notification of succession to the treaty. This capacity is subject to the general conditions laid down in article 19, subparagraphs (a), (b) and (c), of the 1969 Vienna Convention on the Law of Treaties and reiterated in guideline 3.1, to which paragraph 2 of this guideline refers. Under article 20, paragraph 3, of the 1978 Vienna Convention, the rules set out in articles 20 to 23 of the 1969 Vienna Convention on the Law of Treaties apply in respect of reservations formulated by a newly independent State when making the notification of succession. Given that the relevant rules regarding the formulation of a reservation are duly specified in Part 2 of the Guide to Practice, paragraph 3 of this guideline refers to that part of the Guide.[1114]

(16) In its commentary to draft article 19, the Commission noted that the capacity of a newly independent State to formulate reservations to a treaty to which it has made a notification of succession seemed to be confirmed in practice.[1115] In support of this solution, Waldock, in his third report, based his views in particular on the practice of the Secretary-General of the United Nations, who, on several occasions, had recognized that newly independent States had that capacity without prompting any objections from States to that assumption.[1116] The second Special Rapporteur was also in favour, for "practical" reasons, of recognizing the right of a newly independent State to make new reservations when making a notification of succession.[1117]

(17) The view of the two Special Rapporteurs prevailed in the Commission, which, as indicated in the commentary to draft article 19 as finally adopted, had a choice between two alternatives:

> (a) to decline to regard any notification of succession made subject to new reservations as a true instrument of succession and to treat it in law as a case of accession, or (b) to accept it as having the character of a succession but at the same time apply to it the law governing reservations as if it were a wholly new expression of consent to be bound by the treaty.

Drawing upon the practice of the Secretary-General and wishing to take a "flexible" approach in this regard, the Commission opted for the second alternative, noting also that it might ease the access of a newly independent State to a treaty that was not, "for technical reasons, open to its participation by any other procedure than succession".[1118]

(18) At the 1977–1978 Vienna Conference, the Austrian delegation challenged this solution — which, in purely logical terms, was somewhat incompatible with the preceding

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[1114] The correspondences between the Vienna Convention and the Guide to Practice are as follows:

1969 Convention, art. 20: para. 1 = draft guidelines 2.8.0 and 2.8.1 (with drafting changes); para. 2 = draft guideline 2.8.2 (*idem*); para. 3 = draft guideline 2.8.7 (*idem*); para. 4 (a): The Commission has not yet adopted a corresponding draft guideline; para. 4 (b) = draft guideline 2.6.8 (with drafting changes); para. 5 = draft guideline 2.8.1 (with drafting changes).

Art. 21: The Commission has not yet adopted a corresponding draft guideline.

Art. 22: para. 1 = draft guideline 2.5.1 (idem); para. 2 = draft guideline 2.7.1 (idem); para. 3 (a) = draft guidelines 2.5.8 and 2.5.9 (with drafting changes); para. 3 (b) = draft guideline 2.7.5 (*idem*).

Art. 23: para. 1 = draft guidelines 2.1.1, 2.6.7 and 2.8.4 (with drafting changes); para. 2 = draft guideline 2.2.1 (*idem*); para. 3 = draft guideline 2.8.6 (with drafting changes); para. 4 = draft guidelines 2.5.2 and 2.5.7 (with drafting changes).

[1115] *Yearbook ... 1974*, vol. II, Part One, pp. 224–225, paras. (7) to (12).

[1116] Third report (see footnote 1090 above), pp. 48–50.

[1117] Sir Francis Vallat, first report, *Yearbook … 1974*, vol. II, Part One, p. 54, paras. 291–294.

[1118] Commentary to draft article 19, *Yearbook ... 1974*, vol. II, Part One, p. 227, para. (20).

paragraph — and proposed the deletion of paragraphs 2 and 3 of the provision that would become article 20 of the 1978 Convention.[1119] Austria contended that recognizing the right of a newly independent State to formulate new reservations when notifying its succession "seemed to be based on an erroneous concept of succession"[1120] and that "if a newly independent State wished to make reservations, it should use the ratification or accession procedure provided for becoming a party to a multilateral treaty".[1121] However, the Austrian amendment was rejected by 39 votes to 4, with 36 abstentions.[1122] Those States opposing the Austrian amendment at the Vienna Conference put forth various arguments, including the desirability of ensuring that the newly independent State would "not be obliged to conform with more complicated ratification procedures than those provided for by the International Law Commission",[1123] the alleged incompatibility of the Austrian amendment with the principle of self-determination[1124] or the principle of the "clean slate",[1125] the need to be "realistic" rather than "puristic",[1126] and the fact that a succession of States was not a "legal inheritance or a transmission of rights and obligations".[1127] Some authors have echoed these criticisms,[1128] while others take the view that "the right to make reservations is not a right that is transmissible through inheritance, but a prerogative that is part of the set of supreme powers attributed by virtue of the protective principle to sovereign States" and that "the formal recognition of this capacity [on the part of a newly independent State] represents a 'pragmatic' solution that takes account of the 'non-automatic', i.e., voluntary, nature of succession to treaties on the part of newly independent States".[1129]

(19) In fact, the principles laid down in article 20 of the 1978 Convention are not overly rigid and are flexible enough to accommodate a wide variety of practices, as shown by a number of cases of succession to treaties deposited with the Secretary-General of the United Nations:

> (i) In many cases, newly independent States have deposited a notification of succession to a particular treaty without making any mention of the question of reservations; in such cases, the Secretary-General has included the newly independent State in the list of States parties to the treaty concerned without passing judgement upon the status of reservations formulated by the predecessor State;[1130]

[1119] A/CONF.80/16, 27th meeting of the Committee of the Whole, paras. 59–64.

[1120] *Ibid.*, para. 60.

[1121] *Ibid.* See also A/CONF.80/16, 28th meeting of the Committee of the Whole, para. 30.

[1122] *Ibid.*, 28th meeting of the Committee of the Whole, para. 40.

[1123] A/CONF.80/16, 27th meeting of the Committee of the Whole, para. 71 (Netherlands).

[1124] *Ibid.*, para. 73 *in fine* (Algeria) and para. 89 (Guyana).

[1125] *Ibid.*, para. 85 (Madagascar).

[1126] *Ibid.*, para. 77 (Poland).

[1127] A/CONF.80/16, 28th meeting of the Committee of the Whole, para. 7 (Israel). According to the representative of Israel, "A newly independent State … would simply have the right of option to establish itself as a separate party to the treaty in virtue of the legal nexus established by its predecessor. Its right was to notify its own consent to be considered as a separate party to the treaty; that was not a right to step into the predecessor's shoes. The significance of article 19 was that a newly independent State should be 'considered' as maintaining its succession to the treaty. In other words, notification of succession was an independent act of the successor State's own volition."

[1128] See Karl Zemanek, "State succession after decolonization", *Recueil des cours: Collected Courses of The Hague Academy of International Law*, vol. 116 (1965-III), pp. 234–235; André Gonçalves Pereira, *La succession d'États en matière de traités* (Paris: Pedone, 1969), pp. 175–176, note 50; and Hanna Bokor-Szegő, *New States and International Law* (Budapest: Akadémiai Kiadó, 1970), p. 100.

[1129] Marco G. Marcoff, *Accession à l'indépendance et succession d'États aux traités internationaux* (Fribourg: Éditions universitaires, 1969), p. 346.

[1130] See, for example, *Multilateral Treaties* ..., footnote 341 above, chap. IV.2: The Solomon Islands

(ii) Some newly independent States have expressly maintained the reservations formulated by the predecessor State;[1131]

(iii) In other cases, the newly independent State has essentially reformulated the same reservations made by the predecessor State;[1132]

(iv) There have been cases in which the newly independent State has maintained the reservations formulated by the predecessor State while adding new reservations;[1133]

(v) There have also been cases in which the newly independent State has "reworked" reservations made by the predecessor State;[1134]

(vi) In a few cases, the newly independent State has withdrawn the predecessor State's reservations while formulating new reservations.[1135]

All these possibilities are acceptable under the terms of article 20, whose flexibility is unquestionably one of its greatest virtues.

(20) Although article 20 of the 1978 Vienna Convention applies only to reservations formulated in respect of treaties between States, guideline 5.1.1, like the other guidelines in the Guide to Practice, also covers reservations to treaties between States and international organizations.

5.1.2 [5.2] Uniting or separation of States

1. Subject to the provisions of guideline 5.1.3, a successor State which is a party to a treaty as the result of a uniting or separation of States shall be considered as maintaining any reservation to the treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates, unless it expresses its intention not to maintain one or more reservations of the predecessor State at the time of the succession.

2. A successor State which is a party to a treaty as the result of a uniting or separation of States may not formulate a new reservation.

3. When a successor State formed from a uniting or separation of States makes a notification whereby it establishes its status as a party or as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but to which the predecessor State was a contracting State, that State shall be considered as maintaining any reservation to the treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates, unless it expresses a contrary intention when making the notification or formulates a reservation which relates to the same subject matter as that reservation. That successor State may formulate a new reservation to the treaty.

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succeeded to the International Convention on the Elimination of All Forms of Racial Discrimination without making any mention of the reservations made by the predecessor State (the United Kingdom), which are not reproduced in relation to the Solomon Islands. The same is true in the case of Senegal's and Tunisia's succession to the 1951 Convention relating to the Status of Refugees (*ibid.*, chap. V.2).

[1131] Cyprus, Gambia and Tuvalu (*ibid.*, chap. V.2, 1951 Convention relating to the Status of Refugees).

[1132] Fiji and Jamaica (*ibid.*).

[1133] Botswana and Lesotho (*ibid.*, chap. V.3, Convention relating to the Status of Stateless Persons).

[1134] Fiji (*ibid.*, chap. V.3, Convention relating to the Status of Stateless Persons).

[1135] Zambia (*ibid.*, chap. V.3, Convention relating to the Status of Stateless Persons); Zimbabwe (*ibid.*, chap. V.2, Convention relating to the Status of Refugees).

4. A successor State may formulate a reservation in accordance with paragraph 3 only if the reservation is one the formulation of which would not be excluded by the provisions of subparagraph (a), (b) or (c) of guideline 3.1 of the Guide to Practice. The relevant rules set out in Part 2 (Procedure) of the Guide to Practice apply in respect of that reservation.

Commentary

(1) As the title suggests, this guideline deals with the uniting or separation of States. These cases are not covered by article 20 of the 1978 Vienna Convention or by guideline 5.1.1, which applies only to newly independent States, that is to say those arising from a decolonization process.[1136] This guideline is intended to fill a gap in the Vienna Convention. Given the general scope of this guideline, which covers both cases involving the separation of parts of a State and cases involving the uniting of two or more States, the term "predecessor State" should be understood, in cases involving the uniting of States, to mean one or more of the predecessor States.

(2) Guideline 5.1.2 deals with two situations separately. Paragraphs 1 and 2 deal with the case in which a State formed from a uniting or separation of States succeeds *ipso jure* to a treaty, whereas paragraph 3 deals with the case in which such a successor State succeeds to a treaty only through a notification whereby it expresses its intention to succeed thereto. While the presumption in favour of the maintenance of the predecessor State's reservations is applicable in both situations envisaged,[1137] the distinction between the two situations proves decisive with respect to the capacity to formulate new reservations, which is recognized to a State formed from a uniting or separation of States only in the event that succession to a treaty is voluntary in nature.[1138]

(3) The reference in paragraphs 1 and 2 of this guideline to "a successor State which is a party to a treaty *as the result of* a uniting or separation of States" was retained to indicate that the guideline covers the situation in which a succession to the treaty occurs *ipso jure*, and not on the basis of a notification to that effect by the successor State. Under part IV of the 1978 Vienna Convention, such is the situation of a State formed from a uniting or separation of States with regard to treaties in force for any of the predecessor States at the date of the succession of States; in principle,[1139] these treaties remain in force for a State formed from a uniting of two or more States.[1140] The same applies to the case of a State formed from a separation of States, with respect to treaties in force at the date of the succession of States in respect of the entire territory of the predecessor State, and also treaties in force in respect only of that part of the territory of the predecessor State which has become the territory of the successor State.[1141] However, it was observed within the Commission that the practice of States and depositaries did not seem unanimous in terms of recognition of the automatic nature of succession to treaties in the context of a separation or uniting of States.

(4) On the other hand, under the 1978 Vienna Convention, succession does not occur *ipso jure* in respect of a State formed from a uniting or separation of States with regard to treaties to which the predecessor State was a contracting State at the date of succession of

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[1136] See above, para. (2) of the general commentary to Part 5 of the Guide to Practice and paras. (1) and (2) of the commentary to guideline 5.1.1.

[1137] See below, paras. (5) and (10) of the commentary.

[1138] See below, paras. (11) and (15) of the commentary.

[1139] Articles 31 and 34 of the Convention recognize exceptions concerning the express or tacit agreement of the parties.

[1140] See article 31 of the Convention.

[1141] See article 34 of the Convention.

States but which, at that date, were not in force for the State concerned. In such cases, succession to the treaty is of a voluntary nature and implies a notification whereby the successor State establishes, as the case may be, its status as a contracting State or as a party to the treaty in question.[1142] These situations are referred to in paragraph 3 of this guideline.

(5) Paragraphs 1 and 3 of this guideline extend to the two different situations envisaged therein the presumption in favour of the maintenance of the predecessor State's reservations, which is provided for explicitly in article 20, paragraph 1, of the 1978 Vienna Convention for newly independent States in the context of a notification of succession and which is reproduced in guideline 5.1.1. There can be no doubt as to the application of this presumption to successor States other than newly independent States; it may even be said that the presumption is even stronger when succession occurs *ipso jure*. This tallies, moreover, with the view expressed during the 1977–1978 Vienna Conference by some delegations which considered that the presumption was self-evident in cases of the uniting or separation of States, in the light of the principle of continuity reflected in the Convention in relation to these kinds of succession.[1143]

(6) While this provision establishes a general presumption in favour of the maintenance of reservations, there are nonetheless exceptions to this presumption in certain cases involving the uniting of two or more States; these are covered by guideline 5.1.3, which is referred to in paragraph 1 of the present guideline.

(7) The applicability of the presumption in favour of the maintenance of the predecessor State's reservations to States formed from the uniting or separation of States seems to be reflected to some extent in practice.

(8) While the Secretary-General of the United Nations, in the exercise of his functions as depositary, generally avoids taking a position on the status of reservations formulated by the predecessor State, the practice in cases involving the separation of States, in particular those of the States that emerged from the former Yugoslavia and Czechoslovakia,[1144] shows that the predecessor State's reservations have been maintained. It should be noted, in this regard, that the Czech Republic,[1145] Slovakia,[1146] the Federal Republic of Yugoslavia[1147]

[1142] See articles 32 and 36 of the Convention.

[1143] See, in this regard, the statements of the delegations of Poland (A/CONF.80/16/Add.1, 43rd meeting of the Committee of the Whole, para. 13), France (*ibid.*, para. 16), Cyprus (*ibid.*, para. 20), Yugoslavia (*ibid.*, para. 21) and Australia (*ibid*, para. 22). See also the draft article 36 *bis* proposed by Germany (see footnote 1089 above), which aimed, among other things, at extending the presumption in question to cases of uniting and separation of States.

[1144] There appears to be virtually no relevant practice in relation to the successor States of the former Soviet Union.

[1145] In a letter dated 16 February 1993 addressed to the Secretary-General and accompanied by a list of multilateral treaties deposited with the Secretary-General, the Government of the Czech Republic communicated the following: "In conformity with the valid principles of international law and to the extent defined by it, the Czech Republic, as a successor State to the Czech and Slovak Federal Republic, considers itself bound, as of 1 January 1993, i.e., the date of the dissolution of the Czech and Slovak Federal Republic, by multinational international treaties to which the Czech and Slovak Federal Republic was a party on that date, including reservations and declarations to their provisions made earlier by the Czech and Slovak Federal Republic.

The Government of the Czech Republic has examined multilateral treaties the list of which is attached to this letter. [The Government of the Czech Republic] considers to be bound by these treaties as well as by all reservations and declarations to them by virtue of succession as of 1 January 1993. The Czech Republic, in accordance with the well-established principles of international law, recognizes signatures made by the Czech and Slovak Federal Republic in respect of all signed treaties as if they were made by itself", in *Multilateral Treaties ...*, footnote 341 above, *Status of Treaties*, *Historical* and, subsequently, Montenegro[1148] formulated general declarations whereby these successor States reiterated the reservations of the predecessor State.[1149] In addition, in some cases the predecessor State's reservations have been expressly confirmed[1150] or reformulated[1151] by the successor State in relation to a particular treaty. In the case of the Republic of Yemen (united), there was also maintenance of reservations by the successor State. In a letter dated 19 May 1990 addressed to the Secretary-General, the Ministers for Foreign Affairs of the Yemen Arab Republic and the People's Democratic Republic of Yemen communicated the following:

> "As concerns the treaties concluded prior to their union by the Yemen Arab Republic or the People's Democratic Republic of Yemen, the Republic of Yemen (as now united) is accordingly to be considered as a party to those treaties as from the date when one of these States first became a party to those treaties. Accordingly the tables showing the status of treaties will now indicate under the designation 'Yemen' the date of the formalities (signatures, ratifications, accessions, declarations and reservations, etc.) effected by the State which first became a party, those eventually effected by the other being described in a footnote."[1152]

(9) In addition, some elements of the practice in relation to treaties deposited with other depositaries seem to confirm the general presumption in favour of the maintenance of the predecessor State's reservations, although, admittedly, the practice is rather sporadic. The

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Information, under "Czech Republic".

[1146] In a letter dated 19 May 1993 and also accompanied by a list of multilateral treaties deposited with the Secretary-General, the Government of the Slovak Republic communicated the following: "In accordance with the relevant principles and rules of international law and to the extent defined by it, the Slovak Republic, as a successor State, born from the dissolution of the Czech and Slovak Federal Republic, considers itself bound, as of 1 January 1993, i.e., the date on which the Slovak Republic assumed responsibility for its international relations, by multilateral treaties to which the Czech and Slovak Federal Republic was a party as of 31 December 1992, including reservations and declarations made earlier by Czechoslovakia, as well as objections by Czechoslovakia to reservations formulated by other treaty-parties" (*ibid.*, *Historical Information*, under "Slovakia").

[1147] By a notification dated 8 March 2001, the Government of the Federal Republic of Yugoslavia deposited an instrument, *inter alia*, communicating its intent to succeed to various multilateral treaties deposited with the Secretary-General and confirming certain actions relating to such treaties: "[T]he Government of the Federal Republic of Yugoslavia maintains the signatures, reservations, declarations and objections made by the Socialist Federal Republic of Yugoslavia to the treaties listed in the attached annex 1, prior to the date on which the Federal Republic of Yugoslavia assumed responsibility for its international relations" (*ibid.*, *Historical Information*, under "Yugoslavia").

[1148] On 23 October 2006 the Secretary-General received a letter dated 10 October 2006 from the Government of Montenegro, accompanied by a list of multilateral treaties deposited with the Secretary-General, informing him that: "[The Government of] … the Republic of Montenegro does maintain the reservations, declarations and objections made by Serbia and Montenegro, as indicated in the Annex to this instrument, prior to the date on which the Republic of Montenegro assumed responsibility for its international relations" (*ibid.*, *Historical Information*, under "Montenegro").

[1149] See also the case of other successors to the former Yugoslavia (apart from the Federal Republic of Yugoslavia), which appear in the list of successor States for a number of treaties deposited with the Secretary-General with the indication, in footnotes, of reservations formulated by the former Yugoslavia (see, for example, Bosnia and Herzegovina, Croatia, Serbia and the former Yugoslav Republic of Macedonia in relation to the Convention on the Privileges and Immunities of the United Nations (*ibid.*, chap. III.1, note 2); the Protocol relating to the Status of Refugees (chap. V.5, note 5) and the Convention relating to the Status of Stateless Persons (chap. V.3, note 2).

[1150] Convention on the Prevention and Punishment of the Crime of Genocide, reservation formulated by the Federal Republic of Yugoslavia (*ibid.*, chap. IV.1).

[1151] Convention on the Rights of the Child (*ibid.*, chap. IV.11, under "Slovenia").

[1152] *Ibid.*, *Historical Information*, under "Yemen".

Czech Republic and Slovakia transmitted to a number of depositaries notifications of succession similar to those transmitted to the United Nations Secretary-General and providing for the maintenance of reservations formulated by the predecessor State.[1153] Neither the depositaries in question nor the other States parties to the treaties concerned raised any objections to this practice. The Universal Postal Union's reply to the Special Rapporteur's questionnaire is also worthy of note.[1154] That organization's practice is to consider that valid reservations applicable to a member State are automatically transferred to the successor State; the same is true in the case of States that have become independent by separating from a member State. The Council of Europe applied the same presumption with respect to Montenegro. In a letter dated 28 June 2006 addressed to the Minister for Foreign Affairs of Montenegro, the Director-General of Legal Affairs of the Council of Europe indicated that, in accordance with article 20 of the Vienna Convention of 1978, the Republic of Montenegro was considered "as maintaining these reservations and declarations because the Republic of Montenegro's declaration of succession does not express a contrary intention in that respect".[1155] That letter also included a list of reservations and declarations that had been revised in places to remove references to the Republic of Serbia. By a letter dated 13 October 2006, the Minister for Foreign Affairs of Montenegro communicated his agreement on the wording of those reservations and declarations, as adapted by the depositary. The practice followed by Switzerland as depositary of a number of multilateral treaties likewise does not appear to be in fundamental contradiction to that of the Secretary-General of the United Nations. It is true that Switzerland had initially applied, to a successor State that made no reference to the status of the predecessor State's reservations, the presumption that such reservations were not maintained. Today, however, Switzerland no longer applies any presumption, as its practice is to invite the successor State to communicate its intentions as to whether or not it is maintaining reservations formulated by the predecessor State.[1156]

(10) As with newly independent States, the presumption in favour of the maintenance of the predecessor State's reservations is also rebuttable in respect of successor States formed from a uniting or separation of States. In this respect, as is reflected in paragraph 1 and paragraph 3 of this guideline, there is no doubt that such a successor State may reverse the presumption by expressing its intention not to maintain one or more reservations of the predecessor State. Under paragraph 1 of guideline 5.1.1, the reversal of the presumption also occurs when a newly independent State formulates a reservation which relates to the

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[1153] See Václav Mikulka, "The Dissolution of Czechoslovakia and Succession in Respect of Treaties", in Mojmir Mrak (ed.), *Succession of States* (The Hague/Boston/London: M. Nijhoff, 1999), pp. 111–112.

[1154] Questionnaire prepared by the Special Rapporteur pursuant to a decision of the Commission reflected in para. 489 of its report on the work of its forty-seventh session (2 May–21 July 1995), *Yearbook … 1995*, vol. II, Part Two, document A/50/10, p. 108.

[1155] JJ55/2006, PJD/EC (translated by the Secretariat in its memorandum (A/CN.4/616), see footnote 1081 above, p. 23, para. 67).

[1156] See the letter dated 3 May 1996 from the Directorate of Public International Law addressed to an individual, describing changes in the practice of Switzerland as depositary State for the Conventions of 12 August 1949 for the protection of victims of war, in relation to the succession of States to treaties; reproduced in *Revue suisse de droit international et de droit européen*, 1997, pp. 683–685, in particular p. 684. This approach was confirmed in an opinion given on 6 February 2007 by the Directorate of Public International Law of the Federal Department of Foreign Affairs, entitled "Pratique de la Suisse en tant qu'État dépositaire. Réserves aux traités dans le contexte de la succession d'États", reproduced in *Jurisprudence des autorités administratives de la Confédération (JAAC)*, 5 December 2007, pp. 328–330, in particular p. 330 (available from www.bk.admin.ch/dokumentation/02574/02600/index.html?lang=fr).

"same subject matter" as the reservation formulated by the predecessor State.[1157] In guideline 5.1.2, this possibility is referred to in paragraph 3, which applies to situations in which succession to the treaty by a State formed from a uniting or separation of States is of a voluntary nature. In contrast, the possibility of reversing the presumption by the formulation of a reservation relating to the same subject is not mentioned in paragraph 1, as the capacity to formulate reservations is not recognized to a successor State when the succession does not depend on an expression of will on its part.

(11) If, in cases involving the uniting or separation of States, succession is considered to take place *ipso jure* in respect of treaties that were in force for the predecessor State at the time of the succession of States, it is difficult to contend that a successor State may evade or lighten its obligations by formulating reservations. Paragraph 2 of the guideline therefore rules out the freedom of such a successor State to formulate new reservations to the treaty.

(12) Also worth mentioning in this regard, in addition to the arguments made against this possibility during the drafting of the 1978 Convention,[1158] is the position taken by the Council of Europe in its letter of 28 June 2006 to Montenegro,[1159] to the effect that that State did "not have the possibility, at this stage, to make new reservations to the treaties already ratified" and to which it had notified its succession.[1160] This position seems to be consistent with the rule of *ipso jure* succession to treaties, as set out in the 1978 Convention for cases involving the uniting or separation of States. This solution also seems to have been confirmed in practice, as successor States other than newly independent States do not seem to have formulated new reservations upon succeeding to treaties.

(13) The solution set out in paragraph 2 of guideline 5.1.2 also seems to be echoed in the separate opinion annexed by Judge Tomka to the judgment of the International Court of Justice of 26 February 2007 in the *Genocide* case:

> 35. There can be no doubt that this decision to notify of the accession to the Genocide Convention, with a reservation to Article IX and *not succession (where no reservation is allowed)* was motivated by the considerations relating to the present case. (…)
>
> "*That single notification of accession, in my view, was totally inconsistent with the succession by the Federal Republic of Yugoslavia* — notified the very same day to the United Nations Secretary-General as accession to the Genocide Convention — *to the Vienna Convention on Succession of States in Respect of Treaties*, which in article 34 provides that the treaties of the predecessor State continue in force in respect of each successor State. By the latter notification of succession, the Federal Republic of Yugoslavia became a contracting State of the

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[1157] See guideline 5.1.1, para. 1, above.

[1158] It is worth recalling the objections formulated by certain delegations to the proposal by the Federal Republic of Germany (later withdrawn) to include a draft article 36 *bis* in the Convention which would have granted to successor States other than newly independent States, among other things, the freedom to formulate new reservations, even in respect of a treaty that remains in force for the successor State (A/CONF.80/16/Add.1, 43rd meeting, paras. 9–12) (see footnote 1089 above). The delegations in question considered that giving a successor State the right to formulate new reservations was inconsistent with the principle of *ipso jure* continuity of treaties set out by the Convention for cases involving the uniting or separation of States (see A/CONF.80/16/Add.1, 43rd meeting, para. 14 (Poland), para. 15 (United States of America), para. 18 (Nigeria), para. 19 (Mali), para. 20 (Cyprus), para. 21 (Yugoslavia), para. 22 (Australia) and para. 24 (Swaziland, albeit in more nuanced terms).

[1159] See above, footnote 1155.

[1160] Translated by the Secretariat in its memorandum (A/CN.4/616), see footnote 1081 above, p. 23, para. 69.

Vienna Convention on Succession of States in Respect of Treaties as of April 1992. That Convention entered into force on 6 November 1996. Although not formally applicable to the process of the dissolution of the former Yugoslavia, which occurred in the 1991–1992 period, in light of the fact that the former Yugoslavia consented to be bound by the Vienna Convention already in 1980, and the Federal Republic of Yugoslavia has been a contracting State to that Convention since April 1992, *one would not expect, by analogy to article 18 of the Vienna Convention on the Law of Treaties, a State which, through notification of its accession, expresses its consent to be considered as bound by the Vienna Convention on Succession of States in Respect of Treaties to act in a singular case inconsistently with the rule contained in article 34 of that Convention, while in a great number of other cases to acting in full conformity with that rule*. These considerations, taken together, lead me to the conclusion that the Court should not attach any legal effect to the notification of accession by the Federal Republic of Yugoslavia to the Genocide Convention, and should instead consider it bound by that Convention on the basis of the operation of the customary rule of *ipso jure* succession codified in article 34 as applied to cases of the dissolution of a State."[1161]

(14) However, as guideline 5.1.9 below indicates, it is necessary to consider that the formulation of a reservation by a successor State, formed from a uniting or separation of States, in respect of which the treaty remains in force should be likened to the late formulation of a reservation.

(15) In contrast, the capacity to formulate new reservations that is recognized in the case of newly independent States in paragraph 2 of guideline 5.1.1 could be extended, it would seem, to successor States formed from a uniting or separation of States when their succession to a treaty is of a voluntary nature in that it occurs through a notification. Such is the case with respect to treaties which, on the date of the succession of States, were not in force for the predecessor State but to which it was a contracting State.[1162] In terms of the capacity to formulate new reservations, there is no reason to differentiate between successor States and newly independent States to the extent that, in both cases, succession to the treaty involves an expression of intention on the part of the State concerned.

(16) Paragraph 4 of guideline 5.1.2 recalls that any reservation formulated by a successor State formed from a uniting or separation of States, in accordance with paragraph 3 of this guideline, is subject to the conditions of permissibility set out in subparagraphs (a), (b) and (c) of guideline 3.1, which reproduces article 19 of the 1969 and 1986 Vienna Conventions. It also recalls that the relevant rules set out in Part 2 of the Guide to Practice apply in respect of that reservation. Paragraph 4 is the counterpart of paragraphs 2 and 3 of guideline 5.1.1.

5.1.3 [5.3] Irrelevance of certain reservations in cases involving a uniting of States

When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of any of them continues in force in respect of the successor State, such reservations as may have been formulated by any such State which, at the date of the succession of States, was a contracting State in respect of which the treaty was not in force shall not be maintained.

[1161] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, separate opinion of Judge Tomka, para. 35 (italics added).

[1162] See above, para. (4) of commentary to this guideline.

Commentary

(1) Unlike the separation of a State, where succession to a treaty results in the application of a single reservations regime to that treaty, a uniting of States entails a risk that two or more reservations regimes that may be different or even contradictory will apply to the same treaty. Such cases are not merely hypothetical. Nonetheless, the relevant practice does not seem to provide satisfactory answers to the many questions raised by this situation. For example, the aforementioned letter of 19 May 1990 from the Ministers for Foreign Affairs of the Yemen Arab Republic and the People's Democratic Republic of Yemen to the Secretary-General,[1163] in suggesting a solution to the technical problem of how the actions of the two predecessor States in relation to the same treaty should be recorded, referred to a time test whose legal scope appears uncertain in many respects and leaves unanswered the possible future question of the status of reservations formulated by the States concerned prior to the date of their union.

(2) In the case of a treaty which, at the date of a uniting of States, was in force in respect of any of the uniting States and continues in force in respect of the State so formed,[1164] guideline 5.1.2, paragraph 1, establishes the principle that any reservations to such a treaty that were formulated by any of the uniting States continue to apply to the unified State unless the latter expresses a contrary intention. The application of this presumption raises no difficulty provided that the uniting States were either parties or contracting States to the treaty. However, the situation is more complicated if one of those States was a party to the treaty and the other was a contracting State in respect of which the treaty was not in force.

(3) It is this situation that the present guideline seeks to address: it provides only for the maintenance of reservations formulated by the State that was a party to the treaty. This solution is based on the fact that a State — in this case a State formed from a uniting of States — can have only one status in respect of a single treaty: in this case that of a State party to the treaty (principle of *ipso jure* continuity). Thus, for a treaty that continues in force in respect of a State formed from a uniting of States, it seems logical to consider that only those reservations formulated by the State or States in respect of which the treaty was in force at the date of uniting of States may be maintained. Any reservations formulated by a contracting State in respect of which the treaty was not in force become irrelevant.

(4) Guideline 5.1.3[1165] is worded so as to cover not only the situations contemplated in articles 31 to 33 of the 1978 Convention, but also other situations involving the uniting of States in which one of the uniting States retains its international legal personality (a situation not covered by those provisions of the 1978 Vienna Convention).

5.1.4 Establishment of new reservations formulated by a successor State

Part 4 of the Guide to Practice applies to new reservations formulated by a successor State in accordance with guideline 5.1.1 or 5.1.2.

[1163] The relevant text of this letter reads:

> "As concerns the treaties concluded prior to their union by the Yemen Arab Republic or the People's Democratic Republic of Yemen, the Republic of Yemen (as now united) is accordingly to be considered as a party to those treaties as from the date when one of these States first became a party to those treaties. Accordingly the tables showing the status of treaties will now indicate under the designation 'Yemen' the date of the formalities (signatures, ratifications, accessions, declarations and reservations, etc.) effected by the State which first became a party, those eventually effected by the other being described in a footnote" (in *Multilateral Treaties* ..., footnote 341 above, *Status of Treaties, Historical Information*, under "Yemen".

[1164] See article 31 of the 1978 Convention.

[1165] The same is true of guidelines 5.1.6 and 5.2.2.

Commentary

(1) This guideline is a reminder that Part 4 of the Guide to Practice, which concerns the legal effects of a reservation, also applies to new reservations formulated by a successor State. With regard to reservations formulated by a newly independent State, this results from the reference to articles 20 to 23 of the Vienna Convention on the Law of Treaties, contained in article 20, paragraph 3, of the 1978 Vienna Convention. The present guideline also covers new reservations that a successor State may formulate according to guideline 5.1.2, paragraph 3.

(2) While this statement might seem self-evident, it is undoubtedly useful to set it out in a guideline so as to emphasize that a successor State that formulates a new reservation is in the same position, with respect to the legal effects of that reservation, as any other State or international organization that is the author of a reservation. That applies in particular to the conditions for the establishment of a reservation, the freedom of any State or organization to decide whether or not to accept the reservation formulated by the successor State and the effects that the reservation and the reactions to it are likely to have.[1166]

5.1.5 [5.4] Maintenance of the territorial scope of reservations formulated by the predecessor State

Subject to the provisions of guideline 5.1.6, a reservation considered as being maintained in conformity with guideline 5.1.1, paragraph 1, or guideline 5.1.2, paragraph 1 or 3, shall retain the territorial scope that it had at the date of the succession of States, unless the successor State expresses a contrary intention.

Commentary

(1) It seems self-evident that a reservation considered as being maintained following a succession of States retains the territorial scope that it had at the date of the succession of States. This guideline sets out this principle, which follows logically from the idea of continuity inherent in the concept of succession to a treaty, whether it occurs *ipso jure* or by virtue of a notification of succession.

(2) Nonetheless, the successor State's freedom to express its intention to change the territorial scope of a reservation considered as being maintained should be recognized. That is the meaning of the phrase, "unless the successor State expresses a contrary intention", with which this guideline ends. However, it is understood that a declaration by which a successor State expresses its intention to extend the territorial scope of a reservation considered as being maintained would not, by itself, affect the rights and obligations of other contracting States or contracting organizations.

(3) Furthermore, there are exceptions to the principle of the maintenance of the territorial scope of reservations considered as being maintained in certain situations involving the uniting of two or more States. These exceptions, which raise complex issues, are addressed in guideline 5.1.6 and are explicitly excluded from the scope of this guideline.

(4) In addition, there is a need to address separately the problems that arise in relation to reservations in cases of succession involving part of a territory. While these cases do not constitute an exception to the principle established in this guideline (as, in principle, the State that has acquired the territory in question does not in consequence succeed to the

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[1166] See the text of the guidelines of Part 4 of the Guide and commentaries thereto above.

treaties by which the predecessor State was bound), they nonetheless require more specific treatment, which guideline 5.1.7 seeks to afford.

5.1.6 [5.5] Territorial scope of reservations in cases involving a uniting of States

1. When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of only one of the States forming the successor State becomes applicable to a part of the territory of that State to which it did not apply previously, any reservation considered as being maintained by the successor State shall apply to that territory unless:

(a) the successor State expresses a contrary intention when making the notification extending the territorial scope of the treaty; or

(b) the nature or purpose of the reservation is such that the reservation cannot be extended beyond the territory to which it was applicable at the date of the succession of States.

2. When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of two or more of the uniting States becomes applicable to a part of the territory of the successor State to which it did not apply at the date of the succession of States, no reservation shall extend to that territory unless:

(a) an identical reservation has been formulated by each of those States in respect of which the treaty was in force at the date of the succession of States;

(b) the successor State expresses a different intention when making the notification extending the territorial scope of the treaty; or

(c) a contrary intention otherwise becomes apparent from the circumstances surrounding that State's succession to the treaty.

3. A notification purporting to extend the territorial scope of reservations within the meaning of paragraph 2 (b) shall be without effect if such an extension would give rise to the application of contradictory reservations to the same territory.

4. The provisions of the foregoing paragraphs shall apply *mutatis mutandis* to reservations considered as being maintained by a successor State that is a contracting State, following a uniting of States, to a treaty which was not in force for any of the uniting States at the date of the succession of States but to which one or more of those States were contracting States at that date, when the treaty becomes applicable to a part of the territory of the successor State to which it did not apply at the date of the succession of States.

Commentary

(1) This guideline addresses the specific problems that can arise with respect to the territorial scope of reservations considered as being maintained following a uniting of two or more States. Paragraphs 1 to 3 deal with the case of a treaty that, following the uniting of States, remain in force, with reservations, in respect of the successor State. Paragraph 4 provides for the application *mutatis mutandis* of the same solutions to the case in which, following the uniting of States, the successor State is the contracting State to a treaty that was not in force for any of the predecessor States at the date of the uniting.

(2) The principle set out in guideline 5.1.5, namely that the territorial scope of a reservation considered as being maintained following a succession of States remains unchanged, also applies to cases involving the uniting of two or more States, albeit with certain exceptions, which are set out in this guideline. Such exceptions can occur when, following a uniting of two or more States, a treaty becomes applicable to a part of the territory of the unified State to which it did not apply at the date of the succession of States.

(3) Two possible situations should be distinguished in this connection:

- The situation in which, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of only one of the uniting States becomes applicable to a part of the territory of the successor State to which it did not apply previously; and
- The situation in which a treaty that was in force at the date of the succession of States in respect of two or more of the uniting States — but was not applicable to the whole of what was to become the territory of the successor State — becomes applicable to a part of the territory of the successor State to which it did not apply before the uniting.

(4) Paragraph 1 concerns the first situation, that is, where a treaty in force, with reservations, at the date of the succession of States for only one of the States that unite to form the successor State becomes applicable to a part of the territory of the unified State to which it did not apply at the date of the succession of States. Where the territorial scope of a treaty is thus extended by the successor State - which implies its consent (expressed either by a notification or in an agreement with other States parties),[1167] there is every reason to believe that this extension concerns the treaty relationship as modified by the reservations formulated by the State in respect of which the treaty was in force at the date of the uniting. Paragraph 1, subparagraphs (a) and (b), however, provide for two exceptions:

- First, there is in principle nothing to prevent the State formed from a uniting of States, when it gives notification of the extension of the territorial scope of the treaty, from expressing a contrary intention in that regard and electing not to extend the territorial scope of the reservations. Paragraph 1 (a) establishes this possibility.
- Secondly, the reservation's nature or purpose may rule out its extension beyond the territory to which it was applicable at the date of the succession of States. This could be the case, in particular, of a reservation the application of which was already limited to a part of the territory of the State that formulated it, or a reservation that specifically concerns certain institutions belonging only to that State. Paragraph 1 (b) refers to this possibility.

(5) Paragraph 2 concerns, on the other hand, the second situation envisaged in paragraph (3) above, namely the case in which the treaty whose territorial scope is extended by the successor State was in force at the date of the succession of States in respect of at least two of the uniting States but was not at that time applicable to the whole of what was to become the territory of the unified State. The question, then, is whether reservations formulated by any of those States also become applicable to the parts of the territory of the unified State to which the treaty was not applicable at the date of the succession of States. In the absence of specific indications from the successor State, it may be unclear whether and to what extent that State, in extending the territorial scope of the treaty, meant to extend the territorial scope of the reservations formulated by one or another of the States in respect of which the treaty was in force at the date of the succession of States. Unless there are indications to the contrary, it appears reasonable to set out the presumption that none of those reservations extend to parts of the territory of the unified State to which the treaty was not applicable at the date of the succession of States. However, there is no reason not to regard this presumption as rebuttable. A different solution should apply:

[1167] See article 31, para. 2, of the 1978 Vienna Convention.

- When an identical reservation has been formulated by each of the predecessor States in respect of which the treaty was in force, the situation referred to in paragraph 2 (a); in that case one should on the contrary presume that the unified State intends to maintain a reservation that is common to its predecessors and follow the logic reflected in paragraph 1 of this guideline;
- If a State formed from a uniting of States, when it agrees to extend the territorial scope of a treaty, expresses a different intention by specifying the reservations that will apply to the territory to which the treaty has been extended, the situation referred to in paragraph 2 (b); or
- If it becomes otherwise apparent from the circumstances that a State formed from a uniting of States intends to maintain reservations formulated by one of the States in particular, the situation referred to in paragraph 2 (c); this is the case, for example, when the unified State, upon extending the territorial scope of a treaty, refers specifically to formalities performed in respect of the treaty, prior to the date of the union, by one of the States concerned.

(6) In the case of identical reservations, referred to in paragraph 2 (a), the territorial extension of such a reservation to the part of the territory of the State formed from a uniting of States to which it did not apply before the date of succession of the States may, however, not be possible in some situations because of the nature or purpose of the reservation in question. That situation is similar to the one envisaged in paragraph 1 (b). In the context of identical reservations, this situation may arise in the case of the uniting of more than two States, since it is conceivable that an identical reservation formulated by all of the predecessor States in respect of which the treaty was in force at the date of the succession of States could not be extended, because of its nature or its purpose, to the part of the territory of the successor State that, prior to the uniting of States, belonged to another uniting State in respect of which the treaty was not in force at the date of the succession of States. While aware of this possibility, the Commission did not mention it in the text of guideline 5.1.6 so as to avoid overburdening the text.

(7) In the situation envisaged in paragraph 2 (b), the decision of a unified State to extend the scope of various reservations to the territory concerned is only acceptable if those reservations, formulated by two or more of the uniting States, are compatible with each other. They may indeed be incompatible. In that situation, a declaration to that effect by the successor State cannot be regarded as having any effect if it would give rise to the application of contradictory reservations. This is the meaning of paragraph 3 of this guideline.

(8) The rules set out in paragraphs 1 to 3 concern the situation in which the treaty to which the predecessor States' reservation or reservations relate was in force in respect of at least one of them at the date of the succession of States. However, according to paragraph 4, they apply *mutatis mutandis* to reservations considered as being maintained by a unified State that extends the territorial scope of a treaty to which, following the succession of States, it is a contracting State when the treaty was not in force, at the date of the succession of States, in respect of any of the predecessor States even though one, or two or more, of the uniting States, respectively, had the status of a contracting party.[1168] In the same spirit, this solution should be applied to situations — undoubtedly rare, but provided for in article 32, paragraph 2, of the 1978 Vienna Convention — in which a treaty to which one or more of the uniting States were contracting States at the date of the succession of States enters into force after that date because the conditions provided for in the relevant clauses of the

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[1168] See article 32 of the 1978 Vienna Convention.

treaty have been met; in such a case, the successor State would become a State party to the treaty.

(9) Lastly, concerning paragraph 4, it should also be recalled that the issue of the territorial scope of reservations formulated by a contracting State in respect of which the treaty was not in force at the date of the succession of States arises only if the treaty was not in force, on that date, for any of the uniting States; otherwise, the reservations formulated by that contracting State are not considered as being maintained.[1169]

5.1.7 [5.6] Territorial scope of reservations of the successor State in cases of succession involving part of a territory

When, as a result of a succession of States involving part of a territory, a treaty to which the successor State is a party or a contracting State becomes applicable to that territory, any reservation to the treaty formulated previously by that State shall also apply to that territory as from the date of the succession of States unless:

(a) the successor State expresses a contrary intention; or

(b) it appears from the reservation that its scope was limited to the territory of the successor State that was within its borders prior to the date of the succession of States, or to a specific territory.

Commentary

(1) This guideline concerns cases involving the cession of territory or other territorial changes referred to in article 15 (Succession in respect of part of territory) of the 1978 Vienna Convention. This article provides that, as from the date of the succession of States, treaties of the successor State are in force in respect of the territory to which the succession of States relates, while treaties of the predecessor State cease to be in force in respect of that territory. This provision represents an extension of the rule, established in article 29 of the 1969 Vienna Convention on the Law of Treaties, concerning flexibility in the territorial application of treaties. Accordingly, guidelines 5.1.1 and 5.1.2 would not apply to situations falling under article 15 of the Convention because, in these cases, there is in principle no succession to treaties as such. While the State in question is referred to as a "successor State" within the meaning of article 2, paragraph 1 (d), of the 1978 Convention, in a manner of speaking it "succeeds" itself, and its status as a party or as a contracting State to the treaty remains as it was when that State acquired it by expressing its own consent to be bound by the treaty in accordance with article 11 of the 1969 Vienna Convention.

(2) When this situation arises as a result of a succession involving part of a territory, the treaty of the successor State is extended to the territory in question. In this case, it seems logical to consider that the treaty's application to that territory is subject, in principle, to the reservations which the successor State itself had formulated to the treaty.

(3) Here again, however, this principle should be qualified by two exceptions, also based on the principle of consent so prevalent in the law of treaties in general and of reservations in particular. Accordingly, a reservation should not extend to the territory to which the succession relates:

[1169] See guideline 5.1.3 above.

- When the successor State expresses a contrary intention (subparagraph (a)); this case can be likened to a partial withdrawal of the reservation, limited to the territory to which the succession of States relates.[1170] or
- When it appears from the reservation itself that its scope was limited to the territory of the successor State that was within its borders prior to the date of the succession of States, or to a specific territory (subparagraph (b)).

(4) Guideline 5.1.7 is formulated so as to cover not only treaties in force for the successor State at the time of the succession of States, but also treaties not in force for the successor State on that date but to which it is a contracting State, a situation not covered by article 15 of the 1978 Vienna Convention. The verb "apply" in relation to such a treaty should be understood as encompassing both situations, which need not be distinguished from one another in this context in relation to the question of reservations.

(5) This guideline also covers situations in which the predecessor State and the successor State are parties or contracting States — or one is a party and the other is a contracting State — to the same treaty, albeit with non-identical reservations.

(6) However, this guideline does not apply to "territorial treaties" (concerning a border regime or other regime relating to the use of a specific territory). If a succession occurs in relation to such a treaty,[1171] the solutions provided for in guideline 5.1.2 concerning the uniting or separation of States apply *mutatis mutandis* to reservations formulated in respect of that treaty.

5.1.8 [5.7] Timing of the effects of non-maintenance by a successor State of a reservation formulated by the predecessor State

The non-maintenance, in conformity with guideline 5.1.1 or 5.1.2, by the successor State of a reservation formulated by the predecessor State becomes operative in relation to another contracting State or contracting organization or another State or international organization party to the treaty only when notice of it has been received by that State or international organization.

Commentary

(1) Article 20 of the 1978 Vienna Convention does not directly address the effects *ratione temporis* of a declaration whereby a newly independent State announces, when notifying its succession to a treaty, that it is not maintaining a reservation formulated by the predecessor State; even less does it clarify the issue in the context of a succession of States resulting from a uniting or separation of States, as the 1978 Convention does not specify the status of the predecessor State's reservations in that context. Neither practice nor the literature seems to provide a clear answer to this question, which could nonetheless be of some practical importance.

(2) Whether resulting from the expression of a "contrary intention" or from the successor State's formulation of a reservation that "relates to the same subject matter" as a

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[1170] On the partial withdrawal of a reservation, see draft guidelines 2.5.10 and 2.5.11 and the commentary thereto (*Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), pp. 244–259).

[1171] For international jurisprudence on this point, see *inter alia* the Permanent Court of International Justice, Order of 6 December 1930, in the case concerning *Free zones of Upper Savoy and the District of Gex*, Publications of the Permanent Court of International Justice, *Collection of Judgments*, Series A, No. 24, p. 17, and Judgment of 7 June 1932 in the same case, Series A/B, No. 46, p. 145.

reservation formulated by the predecessor State,[1172] it seems reasonable, in relation to its effects *ratione temporis*, to treat the non-maintenance of a reservation following a succession of States as a withdrawal of the reservation in question and to consider it subject, as such, to the ordinary rules of the law of treaties, codified in article 22 of the 1969 and 1986 Vienna Conventions. Pursuant to paragraph 3 (a) of that article, "unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State".

(3) This guideline reproduces *mutatis mutandis* the rule set out in article 22, paragraph 3 (a), of the 1969 Vienna Convention and reflected in draft guideline 2.5.8 concerning the effects *ratione temporis* of the withdrawal of a reservation: this solution, which is particularly important when succession to the treaty (and to the reservation) takes place *ipso jure*, seems to lend itself to all types of succession: not until they are aware of the successor State's intention (by means of a written notification)[1173] can the other parties take the withdrawal into account.

5.1.9 [5.9] Late reservations formulated by a successor State

A reservation shall be considered as late if it is formulated:

(a) by a newly independent State after it has made a notification of succession to the treaty;

(b) by a successor State other than a newly independent State after it has made a notification establishing its status as a party or as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but in respect of which the predecessor State was a contracting State; or

(c) by a successor State other than a newly independent State in respect of a treaty which, following the succession of States, continues in force for that State.

Commentary

(1) The capacity of a newly independent State to formulate reservations to a treaty to which it intends to succeed is not in doubt, nor is the capacity of other successor States to formulate reservations in respect of a treaty that was not in force at the date of the succession of States.[1174] However, that capacity ought not to be unlimited over time. This guideline deals with three situations in which a reservation formulated by a successor State should be subject to the legal regime for late reservations, as set out in guidelines 2.3.1, 2.3.2, 2.3.3 and 2.3.5 provisionally adopted by the Commission.[1175] In this respect, it should be recalled that guideline 2.3.1,[1176] provides that the late formulation of a reservation is permitted only if none of the other contracting parties objects, thereby fully upholding the principle of consent.

[1172] See para. 1 of guideline 5.1.1 and paras. 1 and 3 of guideline 5.1.2 above.

[1173] See draft guideline 2.5.2 on form of withdrawal of a reservation and the commentary thereto (*Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), pp. 201–207).

[1174] See para. 2 of guideline 5.1.1 and para. 3 of guideline 5.1.2.

[1175] See the report of the International Law Commission on the work of its sixtieth session, 5 May–6 June and 7 July–8 August 2008, *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 123, pp. 160–161.

[1176] For the commentary to this guideline, see *ibid., Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 477–489.

(2) The first situation is referred to in subparagraph (a). It concerns reservations that a newly independent State might formulate after it has made a notification of succession. It seems reasonable to consider that if the newly independent State intends to exercise its capacity to formulate reservations to the treaty to which it is succeeding, it should do so when it makes a notification of succession. This is clearly implied by the very definition of reservations contained in guideline 1.1 of the Guide to Practice, which, like article 2, paragraph 1 (j), of the 1978 Vienna Convention — and unlike article 2 (d) of the 1969 Convention on the Law of Treaties — mentions among the temporal elements included in the definition of reservations the time "when [a State is] making a notification of succession to a treaty".[1177] It seems legitimate to conclude from this that reservations formulated by a newly independent State after that date should be considered as late within the meaning of the guidelines referred to in the previous paragraph.

(3) For similar reasons, it seems that the regime for late reservations should apply to the reservations referred to under subparagraph (b) formulated by a successor State other than a newly independent State after the date on which it has established, by a notification to that effect, its status as a party or as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but in respect of which the predecessor State was a contracting State, under the conditions stipulated in guideline 5.1.2, paragraph 3. As in that provision, the term "predecessor State" should be understood here, in cases involving a uniting of States, to mean one or more of the predecessor States.

(4) In fact, the same solution should also apply to any reservation formulated by a successor State other than a newly independent State to a treaty which, following the succession of States, continues in force for that State. In such a case, guideline 5.1.2, paragraph 2, does not recognize a capacity on the part of the successor State to formulate reservations that had not been formulated by the predecessor State. Nonetheless, should the successor State formulate a new reservation to the treaty in question, there are no grounds for treating that State differently from any other State by refusing it the benefit of the legal regime for late reservations.[1178]

5.2 Objections to reservations and succession of States

5.2.1 [5.10] Maintenance by the successor State of objections formulated by the predecessor State

Subject to the provisions of guideline 5.2.2, a successor State shall be considered as maintaining any objection formulated by the predecessor State to a reservation formulated by a contracting State or contracting organization or by a State party or international organization party to a treaty unless it expresses a contrary intention at the time of the succession.

Commentary

(1) This guideline and guidelines 5.2.2 to 5.2.6 aim at filling gaps in the 1978 Vienna Convention. That Convention is not concerned with objections to reservations (nor with

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[1177] The full definition of reservations in guideline 1.1 reads as follows: "'Reservation' means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty *or by a State when making a notification of succession to a treaty*, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization". On the reasons for the inclusion of this reference to the succession of States in draft guideline 1.1, see the commentary to that draft guideline in *Yearbook ... 1998*, vol. II, Part Two, p. 100, paras. (5) and (6) of the commentary.

[1178] See the commentary to guideline 5.1.2 above.

acceptances of reservations) in relation to the succession of States. The Commission itself had decided to leave the question of objections open despite a partial proposal by Waldock.[1179] Notwithstanding a request to that effect from the representative of the Netherlands[1180] and some concerns expressed at the Vienna Conference about this gap in the Convention,[1181] the gap was allowed to remain.

(2) That was a deliberate stance, as explained at the Conference by Mustafa Kamil Yasseen, Chairman of the Drafting Committee: "The Drafting Committee had paid particular attention to the question of objections to reservations and objections to such objections, which had been raised by the Netherlands representative. It had noted that, as was clear from the Commission's commentary to article 19, particularly paragraph (15) (A/CONF.80/4, p. 66),[1182] the article did not deal with that matter, which was left to be regulated by general international law".[1183]

(3) Draft article 19 (the forerunner of article 20 of the 1978 Convention), as adopted by the Commission on second reading in 1974, also did not address the question of objections to reservations in the context of succession of States. Here again, this omission was deliberate; in the commentary to this provision, the Commission noted that:

> it would be better, in accordance with its fundamental method of approach to the draft articles, to leave these matters to be regulated by the ordinary rules applicable to acceptances and objections on the assumption that, unless it was necessary to make some particular provision in the context of the succession of States, the newly independent State would "step into the shoes of the predecessor State".[1184]

These last words could imply that the Commission considered that the transmission of objections should be the rule.[1185]

(4) In order to justify its silence on the question of objections to reservations, the Commission invoked an argument based on their legal effects. It noted, on the one hand, that unless the objecting State has definitely indicated that by its objection it means to preclude the entry into force of the treaty as between the reserving State and the objecting State, the legal position created by an objection to a reservation is "much the same as if no objection had been lodged";[1186] and, on the other, that if such an indication is given, the treaty will not have been in force at all between the predecessor State and the reserving State at the date of the succession.[1187] This also implies that the Commission considered that the prior (maximum-effect) objections of the predecessor State continued to apply.

[1179] See below para. (5) of commentary to this guideline.

[1180] A/CONF.80/16, 27th meeting of the Committee of the Whole, para. 70; 28th meeting of the Committee of the Whole, para. 32; and 35th meeting of the Committee of the Whole, para. 19.

[1181] See A/CONF.80/16, 27th meeting of the Committee of the Whole, para. 85 (Madagascar).

[1182] See below para. (3) of this commentary.

[1183] A/CONF.80/16, 35th meeting of the Committee of the Whole, para. 17.

[1184] *Yearbook ... 1974*, vol. II, Part One, p. 226, para. (15) of the commentary; see also para. (23), at p. 227. This explanation was recalled at the 1977–1978 Vienna Conference by Sir Francis Vallat, acting as an expert consultant; see A/CONF.80/16, 27th meeting of the Committee of the Whole, para. 83.

[1185] In this regard, see P.-H. Imbert, footnote 522 above, p. 320, note 126.

[1186] See above, however, guidelines 4.3 and 4.3.1 to 4.3.7 and the commentaries thereto.

[1187] Commentary to article 19, *Yearbook … 1974*, vol. II, Part One, p. 226, para. (14). This reasoning is supported by Ruda, *op. cit.*, footnote 1106 above, pp. 207–208. See, however, the critical remarks of Jan Klabbers, "State succession and reservations to treaties", in Jan Klabbers and René Lefeber (eds.), *Essays on the Law of Treaties. A Collection of Essays in Honour of Bert Vierdag* (The Hague/Boston/London: Nijhoff, 1998), pp. 109–110.

(5) This was, moreover, the position of Waldock, who, while highlighting the scarcity of practice in this regard, had suggested, again along the lines of the proposals put forward by D.P. O'Connell to the International Law Association,[1188] that the rules regarding reservations should apply *mutatis mutandis* to objections.[1189] In particular, this meant that the same presumption that the Commission would later make with respect to reservations formulated by newly independent States, in its draft article 19, paragraph 1, which was reproduced in article 20, paragraph 1, of the 1978 Vienna Convention, would apply to objections.[1190] The second Special Rapporteur on the topic, Sir Francis Vallat, also supported the presumption in favour of the maintenance of objections formulated by the predecessor State: "on the whole, the reasoning which supports the retention of the presumption in favour of the maintenance of reservations also supports the presumption in favour of the maintenance of objections which is inherent in the present draft", especially, he stressed, since in any event it would "always be open to the successor State to withdraw the objection if it wishes to do so". Nonetheless, Sir Francis considered that there seemed to be "no need to complicate the draft by making express provisions with respect to objections".[1191]

(6) Already noted 35 years ago by Professor Giorgio Gaja,[1192] the dearth of practice in this area is still apparent. It should be noted, however, that certain elements of recent practice also seem to support the maintenance of objections.[1193] Mention should be made of a number of cases in which a newly independent State, in notifying its succession, confirmed the objections made by the predecessor State to reservations formulated by States parties to the treaty.[1194] There have also been a few cases in which objections formulated by the predecessor State have been withdrawn and, at the same time, new objections have been formulated.[1195] With respect to successor States other than newly independent States, it may be noted, for example, that Slovakia explicitly maintained the objections made by Czechoslovakia to reservations formulated by other States parties to the treaties to which it succeeded.[1196] Similarly, the Federal Republic of Yugoslavia stated that

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[1188] *Op. cit.*, footnote 1099 above, "Additional point" No. 13: "Since a new State takes over the legal situation of its predecessor, it takes over the consequences of its predecessor's objections to an incompatible reservation made to a multilateral convention by another party. Therefore the reservation would not be effective against the new State unless the latter formally waives the objection", quoted in the second report of Sir Humphrey Waldock, *Yearbook ... 1969*, vol. II, p. 49, para. 17.

[1189] See draft article 9, para. 3 (*a*), contained in his third report: "The rules laid down in paragraphs 1 and 2 regarding reservations apply also, *mutatis mutandis*, to objections to reservations"; *Yearbook ... 1970*, vol. II, p. 47.

[1190] See para. 1 of guideline 5.1.1 above.

[1191] First report, *Yearbook ... 1974*, vol. II, Part One, p. 54, para. 289.

[1192] *Op. cit.*, footnote 1106 above, p. 56.

[1193] See, in this sense, Renata Szafarz, "Vienna Convention on Succession of States in respect of Treaties: A General Analysis", *Polish Yearbook of International Law*, vol. X (1980), p. 96. G. Gaja, meanwhile, takes the view that practice does not contradict the presumption in favour of the maintenance of objections formulated by the predecessor State, but also does not suffice to support this presumption (*op. cit.*, footnote 1106 above, p. 57).

[1194] *Multilateral Treaties ...*, footnote 341 above, chap. III.3, Vienna Convention on Diplomatic Relations: Malta repeated, upon succession, some of the objections formulated by the United Kingdom, and Tonga indicated that it "adopted" the objections made by the United Kingdom with respect to the reservations and statements made by Egypt; chap. XXI.1, Convention on the Territorial Sea and the Contiguous Zone, and chap. XXI.2, Convention on the High Seas (Fiji); chap. XXI.4, Convention on the Continental Shelf (Tonga).

[1195] *Ibid.*, chap. XXI.2, Convention on the High Seas (Fiji).

[1196] See above, footnote 1146.

it maintained the objections made by the former Yugoslavia,[1197] and Montenegro stated that it maintained the objections made by Serbia and Montenegro.[1198]

(7) It is not immediately clear how this recent practice should be interpreted: it leans in the direction of continuity but could also reflect the absence of a set rule; otherwise, such statements would have been unnecessary.[1199] It nevertheless seems reasonable and logical to revert, in guideline 5.2.1, to the solution proposed by Waldock, who suggested that the rules regarding reservations should apply *mutatis mutandis* to objections,[1200] bearing in mind that, even though the Commission ultimately opted not to include in its draft articles a provision dealing specifically with objections to reservations, the solution proposed by the Special Rapporteur did not give rise to any substantive objections in the Commission.

(8) Like the presumption in favour of the maintenance of reservations, established in article 20, paragraph 1, of the 1978 Vienna Convention, the presumption in favour of the maintenance of objections is warranted for both newly independent States and other successor States. However, there are exceptions to the presumption in favour of the maintenance of objections in certain cases involving the uniting of two or more States, which are referred to in guideline 5.2.2.

(9) Although it refers generally to "a successor State", i.e. a State that replaces another in the responsibility for the international relations of the territory,[1201] guideline 5.2.1 refers only to cases whereby a successor State acquires its status as a party or a contracting State to a treaty by succession, regardless of whether this succession occurs *ipso jure* or through notification. However, the presumption set out in this guideline does not apply to situations in which a successor State that does not succeed *ipso jure* to a treaty decides to become a party or contracting State to that treaty by means other than making a notification of its succession, for instance by acceding to it within the meaning of article 11 of the 1969 Vienna Convention.

5.2.2 [5.11] Irrelevance of certain objections in cases involving a uniting of States

1. When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of any of them continues in force in respect of the State so formed, such objections to a reservation as may have been formulated by any such State which, at the date of the succession of States, was a contracting State in respect of which the treaty was not in force shall not be maintained.

2. When, following a uniting of two or more States, the successor State is a party or a contracting State to a treaty to which it has maintained reservations in conformity with guideline 5.1.1 or 5.1.2, objections to a reservation made by another contracting State or a contracting organization or by a State or an international organization party to the treaty shall not be maintained if the reservation is identical or equivalent to a reservation which the successor State itself has maintained.

[1197] See above, footnote 1147.

[1198] See above, footnote 1148.

[1199] The same could be said of a number of the clarifications proposed under Part 5 of the Guide to Practice, but the case at hand is especially striking, owing to the extreme scarcity of precedents.

[1200] See above para. (5) of the commentary to this guideline.

[1201] See the definitions of "succession of States" and "successor State" contained, respectively, in art. 2, paras. 1 (*b*) and (*d*), of the 1978 Vienna Convention.

Commentary

(1) Guideline 5.1.3, "Irrelevance of certain reservations in cases involving a uniting of States", sets out the exception that must qualify the principle of the maintenance of the predecessor State's reservations in certain situations that may arise in connection with the uniting of two or more States. Such situations arise when, at the date of the succession of States, a treaty in force for one of the predecessor States continues in force for the State formed from a uniting of States: in these circumstances, the reservations formulated by a predecessor State that, at the date of the succession of States, was only a contracting State to the treaty in question shall not be maintained.[1202]

(2) As the same causes produce the same effects, guideline 5.2.1, which sets out the principle that the successor State is presumed to maintain the predecessor State's objections to reservations formulated by other contracting States or contracting international organizations or parties to a treaty to which it has succeeded, should be qualified by the same exception when the above-mentioned situations arise. Paragraph 1 of this guideline specifies that when a treaty continues in force in respect of a unified State, objections to a reservation formulated one of the uniting States which, at the date of the succession of States, was a contracting State in respect of which the treaty was not in force shall not be maintained.

(3) Provision may, however, be made for another situation, one that is specific to objections, by establishing a second exception to the principle laid down in guideline 5.2.1. Paragraph 2 of guideline 5.2.2 sets out this exception, which is justified on logical grounds and relates to the fact that a successor State cannot maintain both a reservation formulated by one of the uniting States and, at the same time, objections made by another such State to an identical or equivalent reservation formulated by a contracting State or party to the treaty that is a third State in relation to the succession of States.

5.2.3 [5.12] Maintenance of objections to reservations of the predecessor State

When a reservation formulated by the predecessor State is considered as being maintained by the successor State in conformity with guideline 5.1.1 or 5.1.2, any objection to that reservation formulated by another contracting State or State party or by a contracting organization or international organization party to the treaty shall be considered as being maintained in respect of the successor State.

Commentary

(1) This guideline sets out the presumption in favour of the maintenance of objections formulated by a contracting State or party to the treaty in relation to reservations of the predecessor State that are considered as being maintained by the successor State in conformity with guidelines 5.1.1 and 5.1.2.

(2) This presumption seems to be called for. It would be difficult to explain why a contracting State or party to a treaty should have to reiterate an objection it has already formulated with respect to a reservation of the predecessor State that applied to the territory to which the succession of States relates.[1203] The objecting State will always have the freedom to withdraw its objection if it does not wish to maintain it in respect of the successor State.

[1202] See the commentary to guideline 5.1.3 above.

[1203] See Gaja, *op. cit.*, footnote 1106 above, p. 67, and the memorandum of the Secretariat, *op. cit.*, footnote 1081, para. 37.

(3) The presumption in favour of the maintenance of objections to reservations of the predecessor State that are maintained by the successor State also finds support in the views expressed by certain delegations at the 1977–1978 Vienna Conference. For example, the representative of Japan indicated that it could go along with the International Law Commission's text of draft article 19 on the understanding that "a State party which had objected to the original reservation which had been made by the predecessor State did not need to repeat the objection with regard to the successor State".[1204] A similar view was expressed by the representative of the Federal Republic of Germany, who considered, with respect to both newly independent States and other successor States, that "the successor State was bound *ipso jure* by the individual treaty relationship created by the predecessor State, including the reservations and other declarations made by that State *and the objections thereto entered by its treaty partners*".[1205]

5.2.4 [5.13] Reservations of the predecessor State to which no objections have been made

When a reservation formulated by the predecessor State is considered as being maintained by the successor State in conformity with guideline 5.1.1 or 5.1.2, a contracting State or State party or a contracting organization or international organization party to the treaty that had not objected to the reservation in respect of the predecessor State may not object to it in respect of the successor State, unless:

(a) the time period for formulating an objection has not yet expired at the date of the succession of States and the objection is made within that time period; or

(b) the territorial extension of the treaty radically changes the conditions for the operation of the reservation.

Commentary

(1) This guideline addresses the situation where a contracting State or State party to a treaty has not objected in time to a reservation formulated by a predecessor State and considered as being maintained by the successor State after a succession of States. In these circumstances, it would be difficult to conceive why such a tacit acceptance of the reservation should be called into question merely because a succession of States has taken place. Accordingly, the guideline excludes, in principle, the capacity of a contracting State or State party to a treaty to object, in respect of a successor State, to a reservation to which it had not objected in respect of the predecessor State. However, there are two possible exceptions.

(2) The first exception, addressed in subparagraph (a), concerns the case in which the succession of States takes place prior to the expiry of the time period during which a contracting State or State party to a treaty could have objected to a reservation formulated by the predecessor State.[1206] In such a situation, the capacity of a contracting State or contracting international organization or of a State or international organization party to the treaty to formulate an objection up until the expiry of that period should be recognized.

(3) The second exception, addressed in subparagraph (b), concerns the case in which "the territorial extension of the treaty radically changes the conditions for the operation of the reservation". This hypothesis may be realized in the situations dealt with in guideline 5.1.6, in which the territorial scope of a reservation is extended because of the extension of

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[1204] A/CONF.80/16, 28th meeting of the Committee of the Whole, paras. 15 and 16.

[1205] A/CONF.80/16, 43rd meeting of the Committee of the Whole, para. 11 (italics added).

[1206] See guideline 2.6.13 and the commentary thereto, *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), pp. 213–217.

the territorial scope of the treaty itself following a uniting of States. Even in such a situation, in order for a State or international organization that has not objected in time to the reservation prior to the date of the succession of States to be able to object to it, it would be necessary that the maintenance of the reservation the territorial scope of which has been extended should upset the balance of the treaty: that is the sense of the restrictive formulation of this exception, which covers only those situations in which the territorial extension of the reservation "radically changes the conditions for the operation of the reservation".

(4) The relevance of the type of situation contemplated in subparagraph (b) was a subject of debate in the Commission. According to a different view, guideline 5.2.4 should not refer to such situations, since the problem that might arise would actually relate to the extension of the territorial scope of the treaty itself, which is governed by the 1978 Vienna Convention,[1207] rather than to the extension of the territorial scope of the reservation, which is only a consequence of it.

5.2.5 [5.14] Capacity of a successor State to formulate objections to reservations

1. When making a notification of succession establishing its status as a party or as a contracting State to a treaty, a newly independent State may, in the conditions laid down in the relevant guidelines of the Guide to Practice, object to reservations formulated by a contracting State or State party or by a contracting organization or international organization party to the treaty, even if the predecessor State made no such objection.

2. A successor State, other than a newly independent State, shall also have the capacity provided for in paragraph 1 when making a notification establishing its status as a party or as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but in respect of which the predecessor State was a contracting State.

3. The capacity referred to in the foregoing paragraphs shall nonetheless not be recognized in the case of treaties falling under guidelines 2.8.2 and 4.1.2.

Commentary

(1) This guideline concerns the capacity of the successor State to formulate objections to reservations formulated in respect of a treaty to which it becomes a contracting State or a party following a succession of States. As in other guidelines, it is necessary to distinguish in that regard two different situations, which call for different solutions:

- On the one hand, cases where a successor State is free to decide whether or not to succeed to a treaty and establishes its status as a contracting State or, where applicable, a party to the treaty when notifying its succession; and
- On the other hand, cases of "automatic succession" in which the successor State "inherits" an existing treaty without being called upon to express its consent.

Guideline 5.2.5 covers only the first hypothesis, while guideline 5.2.6 covers the second.

(2) The hypothesis covered by guideline 5.2.5 in turn encompasses two different situations:

[1207] See in particular article 31 of the 1978 Vienna Convention, which excludes the territorial extension of a treaty by notification by the successor State "if it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation".

- The situation, dealt with in paragraph 1, of a newly independent State making a notification of succession;[1208]
- The situation, dealt with in paragraph 2, of a successor State other than a newly independent State which, by making a notification to that effect, establishes its status as a contracting State or a party to a treaty which, at the date of succession of States, was not in force for the predecessor State but in respect of which the predecessor State was a contracting State.

(3) In both cases envisaged in the guideline, the successor State has the choice as to whether or not to become a party to the treaty. That being the case, there is no reason in principle why it cannot formulate new objections when establishing its status as a contracting State or a party to the treaty by a notification pursuant to paragraph 1 of guideline 5.1.1 or paragraph 3 of guideline 5.1.2. That is the solution set out for each of those two situations in paragraphs 1 and 2, respectively, of guideline 5.2.5.

(4) Waldock had briefly considered this issue in his third report on the succession of States in respect of treaties and took the view that, "whenever a successor State becomes a party not by inheritance but by an independent act establishing its consent to be bound, logic would indicate that it should be wholly responsible for its own reservations, acceptances and objections, and that its relation to any reservations, acceptances and objections of its predecessor should be the same as that of any other new party to the treaty".[1209] It does indeed seem logical to apply to objections the same reasoning that underlies guidelines 5.1.1, paragraph 2, and 5.1.2, paragraph 3, concerning the formulation of reservations by a successor State. Since, in the cases considered here, succession to a treaty takes place only by virtue of a deliberate act on the part of the successor State (a "notification of succession" or, in the case of successor States other than newly independent States, a "notification"), the successor State should be free to modify its treaty obligations, not only by formulating reservations but also, if it so desires, by objecting to reservations formulated by other States even before the date of its succession to the treaty.[1210]

(5) Moreover, while practice in this area is scarce, there have been cases in which newly independent States have formulated new objections when notifying their succession to a treaty. For example, Fiji withdrew objections made by the predecessor State and formulated new objections upon making a notification of succession to the 1958 Geneva Convention on the High Seas.[1211]

(6) Paragraph 3 of the guideline, however, states an exception to the capacity of the successor State to formulate objections that is recognized in paragraphs 1 and 2. The exception concerns the situations covered by article 20, paragraph 2, of the 1969 and 1986 Vienna Conventions — the content of which is reproduced in guideline 4.1.2 — in which a reservation to the treaty must be accepted by all parties. The exception was proposed by Waldock in his third report; draft article 9, paragraph 3, which established the principle that the same rules should apply to both objections and reservations, included a subparagraph (b) worded as follows:

[1208] See articles 17 and 18 of the 1978 Vienna Convention, the text of which is reproduced above in footnote 1093 above.

[1209] *Yearbook ... 1970*, vol. II, p. 47, para. (2) of the commentary to draft article 9; see also para. (5) of the commentary to guideline 5.2.1 above.

[1210] In this regard, in the case of newly independent States, see G. Gaja, footnote 1106 above, p. 66.

[1211] See footnote 1195 above.

> (b) However, in the case of a treaty falling under article 20, paragraph 2, of the Vienna Convention, no objection may be formulated by a new State to a reservation which has been accepted by all the parties to the treaty.[1212]

This exception is intended to ensure that a successor State cannot, by formulating an objection, compel the reserving State to withdraw from such a treaty. It is also consistent with guideline 2.8.2 (Unanimous acceptance of reservations),[1213] to which paragraph 3 refers.

(7) The brevity of the reference in paragraph 1 of the guideline to "the conditions laid down in the relevant guidelines of the Guide to Practice" is warranted by the fact that it would be difficult if not impossible to give an exhaustive list in the draft guideline itself of all the guidelines applicable to the formulation of objections. For the most part the relevant guidelines are contained in section 2.6 of the Guide to Practice concerning the formulation of objections.

(8) Among those guidelines particular attention should be paid to guideline 2.6.13,[1214] which reproduces the temporal requirement set forth in article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions. In the case of an objection by a successor State to a prior reservation, the application of the time limit leads to the conclusion that the successor State has a period of 12 months from the date it has established by notification its status as a contracting State or a party to the treaty within which to formulate the objection. In view of the voluntary nature of succession in the cases contemplated by the present guideline, it is not until the successor State establishes its status as a contracting State or a party to a given treaty that it can be expected to inquire into all the reservations that have been formulated to the treaty and to examine them in order to decide whether or not it intends to object. In that light, it would appear, then, to be in keeping with the spirit of article 20, paragraph 5, of the 1969 Vienna Convention as reproduced in guideline 2.6.13 to allow the successor States that fall under guideline 5.2.5 a time period of 12 months from the date of notification of their succession to the treaty.

5.2.6 [5.15] Objections by a successor State other than a newly independent State in respect of which a treaty continues in force

A successor State, other than a newly independent State, in respect of which a treaty continues in force following a succession of States may not formulate an objection to a reservation to which the predecessor State had not objected unless the time period for formulating an objection has not yet expired at the date of the succession of States and the objection is made within that time period.

[1212] *Yearbook ... 1970*, vol. II, p. 47; see also the explanation of the grounds for this proposal, *ibid.*, p. 52, para. (17) of the commentary to draft article 9.

[1213] Guideline 2.8.2 reads: "In the event of a reservation requiring unanimous acceptance by some or all States or international organizations which are parties or entitled to become parties to the treaty, such an acceptance once obtained is final"; see the report of the International Law Commission on the work of its sixty-first session, 4 May–5 June and 6 July–7 August 2009, *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), p. 212 (commentary, pp. 229–232).

[1214] That guideline reads: "Unless the treaty otherwise provides, a State or an international organization may formulate an objection to a reservation by the end of a period of 12 months after it was notified of the reservation or by the date on which such State or international organization expresses its consent to be bound by the treaty, whichever is later." For the commentary, see *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), pp. 213–217.

Commentary

(1) This guideline, which deals with a situation excluded from the scope of guideline 5.2.5, applies to a successor State other than a newly independent State when, following a uniting or separation of States, a treaty continues in force in respect of that State in the context of a succession that can be termed "automatic", that is, when a treaty continues in force, following a succession of States, in respect of a successor State other than a newly independent State even though there has been no expression of consent by that State. Under Part IV of the 1978 Vienna Convention, such a situation arises, in principle, in the case of a State formed from a uniting of two or more States in relation to treaties in force at the date of the succession of States in respect of any of the predecessor States.[1215] The same is true of a State formed from a separation of States in relation to treaties in force at the date of the succession of States in respect of the entire territory of the predecessor State, as well as treaties that were in force in respect only of that part of the territory of the predecessor State that corresponds to the territory of the successor State.[1216]

(2) Since, in the situations envisaged in the present guideline, the succession to the treaty does not depend on an expression of intent on the part of the State formed from the uniting or separation of States, that State inherits all of the predecessor State's rights and obligations under the treaty,[1217] including objections (or the absence thereof) that the predecessor State had (or had not) formulated in respect of a reservation to the treaty. As one author has written, "When … succession is considered to be automatic, the admissibility of objections on the part of the successor State must be ruled out … If the predecessor State had accepted the reservation, such consent cannot be subsequently revoked either by the same State or by its successor."[1218] It does not appear, moreover, that successor States other than newly independent States have claimed the right to formulate objections to reservations to which the predecessor State had not objected.[1219]

(3) As in the case of guideline 5.2.4 (Reservations of the predecessor State to which no objections have been made), an exception should nonetheless be made for cases in which a succession of States takes place prior to the expiry of the time period during which the predecessor State could have objected to a reservation formulated by another contracting State or party to the treaty. In such a situation, recognizing the successor State's capacity to formulate an objection to such a reservation up until the expiry of that period seems warranted.[1220]

5.3 Acceptances of reservations and succession of States

5.3.1 [5.16 *bis*] Maintenance by a newly independent State of express acceptances formulated by the predecessor State

When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty, it shall be considered as maintaining any express acceptance by the predecessor State of a reservation formulated by a contracting State or by a contracting organization unless it expresses a contrary intention within 12 months of the date of the notification of succession.

[1215] See article 31 of the Convention.

[1216] See article 34 of the Convention.

[1217] See the commentary to paras. 1 and 2 of guideline 5.1.2 above.

[1218] G. Gaja, footnote 1106 above, p. 67.

[1219] The memorandum by the Secretariat cited in footnote 1081 above does not mention any cases in which a successor State formed from a uniting or separation of States has formulated objections to reservations to which the predecessor State had not objected.

[1220] See also the commentary to guideline 5.2.4, para. (2) above.

Commentary

(1) This guideline deals with the status of express acceptances formulated by the predecessor State. That is the only question that remains to be settled in the Guide to Practice with regard to acceptances of reservations in the context of the succession of States. On the one hand, there is no reason to question the right of the successor State to formulate an express acceptance of a reservation formulated, prior to the date of succession to a treaty, by a State or international organization that is a party or a contracting party: the successor State may, of course, exercise this capacity, pursuant to guideline 2.8.3,[1221] as any State is entitled to do at any time, and there is therefore no need for another draft guideline on the matter. On the other hand, what happens in the case of tacit acceptance by a predecessor State which did not object to a reservation in time prior to the date of the succession of States is governed by draft guidelines 5.2.5 and 5.2.6.

(2) As with reservations and objections, the question of the status of express acceptances formulated by a predecessor State calls for an approach that varies, at least in part, according to whether the succession to the treaty occurs through a notification by the successor State or *ipso jure*.

(3) In the case of newly independent States, succession to a treaty occurs by virtue of a notification of succession.[1222] In this context, article 20, paragraph 1, of the 1978 Vienna Convention, reproduced in guideline 5.1.1, paragraph 1, establishes the presumption in favour of the newly independent State's maintenance of the predecessor State's reservations unless, when making the notification of succession, the newly independent State expresses a contrary intention or formulates a reservation which relates to the same subject matter as the reservation of the predecessor State. The Commission is of the view that, although practice regarding express acceptances of reservations in connection with the succession of States appears to be non-existent, the presumption in favour of the maintenance of reservations should logically be transposed to express acceptances.

(4) By analogy, it also seems appropriate to recognize the capacity of the newly independent State to express its intention not to maintain an express acceptance formulated by the predecessor State in respect of a reservation. That capacity does not constitute a derogation from the general rule regarding the final nature of acceptance of a reservation, set forth in guideline 2.8.12:[1223] the voluntary nature of succession to the treaty by the newly independent State justifies this apparent derogation, just as it justifies the newly independent State's capacity to formulate new reservations when making its notification of succession to the treaty,[1224] as recognized in article 20, paragraph 2, of the 1978 Vienna Convention, or the capacity of such a State to formulate objections to reservations that were formulated prior to the date of the notification of succession as recognized in guideline 5.2.5.

(5) However, the question of the time period within which the newly independent State may express its intention not to maintain an express acceptance by the predecessor State remains to be addressed. With respect to the non-maintenance of a reservation made by the

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[1221] For the commentary to this guideline, see *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), pp. 232–235.

[1222] See the commentary to guideline 5.1.1, para. (4), footnote 1093 above and accompanying text.

[1223] For the commentary to this guideline, see *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), pp. 252–253.

[1224] See guideline 5.1.1, para. (2) above.

predecessor State, article 20, paragraph 1, of the 1978 Vienna Convention requires that the newly independent State must express its intention to that effect when making its notification of succession to the treaty. Does the same requirement apply with respect to the non-maintenance of an express acceptance? In the latter case, logic suggests that, by analogy, the approach taken with regard to a newly independent State's formulation of an objection to a reservation formulated prior to the date of the notification of succession should be followed. In fact, it appears that the potential effects of non-maintenance of an express acceptance can be likened, to a great extent, to those of the formulation of a new objection. Consequently, guideline 5.3.1 on the maintenance by a newly independent State of the express acceptances formulated by the predecessor State should be based on the rule applicable to the formulation of an objection by the successor State, and 12 months should be retained as the time period within which the newly independent State may express its intention not to maintain an express acceptance formulated by the predecessor State.[1225] Whereas guideline 5.2.5 concerning objections formulated by a successor State merely refers, in that regard, to the "conditions laid down in the relevant guidelines of the Guide to Practice", which of course include the temporal requirement mentioned, in the present guideline it is not sufficient to refer to general rules, since the question of the maintenance or non-maintenance by the successor State of an express acceptance of a reservation made by the predecessor State does not arise except in relation to the succession of States. It is thus appropriate to stipulate expressly a period of 12 months, on the basis of the approach taken with respect to the formulation of an objection by a successor State.

(6) A newly independent State's expression of its intention on this matter may be conveyed either through its explicit withdrawal of the express acceptance formulated by the predecessor State, or through the formulation by a newly independent State of an objection to the reservation which had been expressly accepted by the predecessor State, the content of which objection would be incompatible, in whole or in part, with that acceptance.

5.3.2 [5.17] Maintenance by a successor State other than a newly independent State of express acceptances formulated by the predecessor State

1. A successor State, other than a newly independent State, in respect of which a treaty continues in force following a succession of States shall be considered as maintaining any express acceptance by the predecessor State of a reservation formulated by a contracting State or by a contracting organization.

2. When making a notification of succession establishing its status as a contracting State or as a party to a treaty which, on the date of the succession of States, was not in force for the predecessor State but to which the predecessor State was a contracting State, a successor State other than a newly independent State shall be considered as maintaining any express acceptance by the predecessor State of a reservation formulated by a contracting State or by a contracting organization unless it expresses a contrary intention within 12 months of the date of the notification of succession.

Commentary

(1) In the case of successor States other than newly independent States, the question of the status of express acceptances formulated by the predecessor State calls for a more nuanced approach. It is necessary to distinguish situations where succession occurs *ipso jure* from those where it occurs through notification.

[1225] See para. (8) of the commentary to guideline 5.2.5 above.

(2) The first situation is governed by paragraph 1 of the present guideline. It arises, in cases involving the uniting or separation of States, with respect to treaties which, on the date of the succession of States, were in force for the predecessor State and remain in force for the successor State.[1226] Guideline 5.2.6 provides that in such a situation the successor State may not formulate an objection to a reservation to which the predecessor State did not object in a timely manner. *A fortiori*, such a successor State may not call into question an express acceptance formulated by the predecessor State.

(3) On the other hand, matters are different in the situation, envisaged in paragraph 2 of the present guideline, where succession to a treaty by a State formed from the uniting or separation of States occurs only through notification to that effect – as is the case with treaties which on the date of the succession of States were not in force for the predecessor State but to which it was a contracting State. In that situation — as for the formulation of new reservations[1227] and new objections[1228] — such other successor States must be recognized as having the same capacity that newly independent States have under guideline 5.3.1.

5.3.3 [5.18] Timing of the effects of non-maintenance by a successor State of an express acceptance formulated by the predecessor State

The non-maintenance, in conformity with guideline 5.3.1 or guideline 5.3.2, paragraph 2, by the successor State of the express acceptance by the predecessor State of a reservation formulated by a contracting State or by a contracting organization becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization.

Commentary

This guideline concerns the effects *ratione temporis* of the non-maintenance by a successor State of an express acceptance of a reservation by the predecessor State. On that point, there seems to be no reason to depart from the approach adopted in guideline 5.1.8 concerning the timing of the effects of non-maintenance by a successor State of a reservation formulated by the predecessor State.

5.4 Interpretative declarations and succession of States

5.4.1 [5.19] Interpretative declarations formulated by the predecessor State

1. A successor State should, to the extent possible, clarify its position concerning interpretative declarations formulated by the predecessor State. In the absence of any such clarification, a successor State shall be considered as maintaining the interpretative declarations of the predecessor State.

2. The preceding paragraph is without prejudice to situations in which the successor State has demonstrated, by its conduct, its intention to maintain or to reject an interpretative declaration formulated by the predecessor State.

[1226] See the commentary to guideline 5.1.2 above, particularly para. (3).

[1227] See article 20, para. 2, of the 1978 Vienna Convention and guideline 5.1.1, para. 2.

[1228] See guideline 5.2.5, para. (2).

Commentary

(1) The succession of States to treaties may also raise questions with regard to interpretative declarations, on which the 1978 Vienna Convention, despite an unsuccessful attempt at an amendment,[1229] is as silent as the 1969 and 1986 Conventions.

(2) Although the text of the Convention is silent on this matter, two questions arise: the first concerns the status of interpretative declarations formulated by the predecessor State, while the second is whether the successor State has the capacity to formulate its own interpretative declarations when it succeeds to the treaty, or thereafter. In either case, it must be borne in mind that according to guideline 2.4.3, "without prejudice to the provisions of guidelines 1.2.1, 2.4.6 and 2.4.7, an interpretative declaration may be formulated at any time".[1230]

(3) Guideline 5.4.1, which is formulated in general terms in order to cover all cases of succession, seeks to answer the first of the two questions raised in the preceding paragraph, namely, the status of interpretative declarations formulated by the predecessor State. Practice provides no answer to this question. Furthermore, interpretative declarations are extremely diverse, both in their intrinsic nature and in their potential effects. It is these considerations, moreover, that explain, at least in part, the lack of detail in the rules governing interpretative declarations in the Guide to Practice. Under these conditions, it is probably best to opt for prudence and pragmatism.

(4) In this spirit, paragraph 1 of the guideline makes a recommendation that States should, to the extent possible, clarify their position concerning interpretative declarations formulated by the predecessor State. On several occasions, the Commission has taken the view that such an approach was appropriate in the context of a Guide to Practice that is not intended to become the text of a convention.[1231] This is especially true in the present case since, in the absence of express treaty provisions, States have broad discretion as to whether and when to make such declarations.

(5) That said, paragraph 1 sets forth the presumption, which seems reasonable in the context of succession to treaties, that, in the absence of such clarification, a successor State shall be considered as maintaining the interpretative declarations of the predecessor State.

[1229] At the Vienna Conference, the delegation of the Federal Republic of Germany proposed an amendment that would have expanded the scope of article 20, the only provision of the 1978 Convention in which the status of reservations is mentioned. The amendment would have preceded the rules concerning reservations, as proposed by the International Law Commission, with a statement that "any statement or instrument made in respect to the treaty in connection with its conclusion or signature by the predecessor State, shall remain effective for the newly independent State" (A/CONF.80/16, 28th meeting; and A/CONF.80/14, para. 118 (b), reproduced in *Documents of the Conference* (A/CONF.80/16/Add.2)). The delegation of the Federal Republic of Germany later withdrew this proposed amendment, to which, for various reasons, several delegations had objected (A/CONF.80/16, 27th meeting, para. 73 (Algeria, which considered that the proposed amendment seemed to affect the principle of self-determination); para. 78 (Poland, which believed that the proposed amendment was not sufficiently clear); para. 87 (Madagascar, which was of the view that the wording of the proposed amendment was "much too broad in scope"); para. 90 (Guyana); and para. 95 (Italy, which found the wording of the proposed amendment "very strong and inflexible")).

[1230] Guidelines 1.2.1 and 2.4.7 concern conditional interpretative declarations, which appear to be subject to the legal regime applicable to reservations. Guideline 2.4.6 concerns the late formulation of an interpretative declaration where a treaty provides that an interpretative declaration may be made only at specified times, in which case this special rule takes precedence over the general rule.

[1231] See in particular guidelines 2.1.9, 2.4.0, 2.4.3 *bis*, 2.6.10 and 2.9.3.

(6) Furthermore, paragraph 2 of the guideline recognizes that there are situations in which, in the absence of an explicit position taken by the successor State, the latter's conduct might answer the question of whether or not it subscribes to an interpretative declaration formulated by the predecessor State; in such cases, this conduct would suffice to establish the status of the predecessor State's interpretative declarations.

(7) With regard to the second question raised in paragraph (2) of the commentary to this guideline, namely the successor State's capacity to formulate interpretative declarations, including declarations that the predecessor State did not formulate, there is little doubt that the existence of this capacity follows directly from guideline 2.4.3, which states that an interpretative declaration may, with some exceptions, be formulated at any time.[1232] Hence there appears to be no valid reason to deprive any successor State of a capacity that the predecessor State could have exercised at any time. The Commission therefore did not deem it necessary to devote a specific draft guideline to this question.

[1232] See also footnote 1230 above. For the commentary to guideline 2.4.3, see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 499–501.

Chapter V
Expulsion of aliens

A. Introduction

107. At its fifty-sixth session (2004), the Commission decided to include the topic "Expulsion of aliens" in its programme of work and to appoint Mr. Maurice Kamto as Special Rapporteur for the topic.[1233] The General Assembly, in paragraph 5 of resolution 59/41 of 2 December 2004, endorsed the decision of the Commission to include the topic in its agenda.

108. At its fifty-seventh session (2005), the Commission considered the preliminary report of the Special Rapporteur (A/CN.4/554).[1234]

109. At its fifty-eighth session (2006), the Commission had before it the second report of the Special Rapporteur (A/CN.4/573 and Corr.1) and a study prepared by the Secretariat (A/CN.4/565 and Corr.1). The Commission decided to consider the second report at its next session, in 2007.[1235]

110. At its fifty-ninth session (2007), the Commission considered the second and third reports of the Special Rapporteur (A/CN.4/573 and Corr.1 and A/CN.4/581) and referred to the Drafting Committee draft articles 1 and 2, as revised by the Special Rapporteur,[1236] and draft articles 3 to 7.[1237]

111. At its sixtieth session (2008), the Commission considered the fourth report of the Special Rapporteur (A/CN.4/594) and decided to establish a working group, chaired by Mr. Donald M. McRae, in order to consider the issues raised by the expulsion of persons having dual or multiple nationality and by denationalization in relation to expulsion.[1238] During the same session, the Commission approved the working group's conclusions and requested the Drafting Committee to take them into consideration in its work.[1239]

112. At its sixty-first session, the Commission considered the fifth report of the Special Rapporteur (A/CN.4/611 and Corr.1). At the Commission's request, the Special Rapporteur then presented a new version of the draft articles on protection of the human rights of

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[1233] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 364. The Commission at its fiftieth session (1998) took note of the report of the Planning Group identifying, *inter alia*, the topic "Expulsion of aliens" for possible inclusion in the Commission's long-term programme of work (*ibid., Fifty-third Session, Supplement No. 10* (A/53/10), para. 554) and at its fifty-second session (2000) it confirmed that decision (*ibid., Fifty-fifth Session, Supplement No. 10* (A/55/10), para. 729). A brief syllabus describing the possible overall structure of, and approach to, the topic was annexed to that year's report of the Commission (*ibid.*, annex). In paragraph 8 of resolution 55/152 of 12 December 2000, the General Assembly took note of the inclusion of the topic in the long-term programme of work.

[1234] *Ibid., Sixtieth Session, Supplement No. 10* (A/60/10), paras. 242–274.

[1235] *Ibid., Sixty-first Session, Supplement No. 10* (A/61/10), para. 252.

[1236] *Ibid., Sixty-second Session, Supplement No. 10* (A/62/10), footnotes 401 and 402.

[1237] *Ibid.*, footnotes 396 to 400.

[1238] *Ibid., Sixty-third Session, Supplement No. 10* (A/63/10), para. 170.

[1239] The conclusions were as follows: (1) the commentary to the draft articles should indicate that, for the purposes of the draft articles, the principle of non-expulsion of aliens applies also to persons who have legally acquired one or several other nationalities; and (2) the commentary should include wording to make it clear that States should not use denationalization as a means of circumventing their obligations under the principle of the non-expulsion of nationals; *ibid.*, paragraph 171.

persons who have been or are being expelled, revised and restructured in the light of the plenary debate (A/CN.4/617). He also submitted a new draft workplan with a view to restructuring the draft articles (A/CN.4/618). The Commission decided to postpone its consideration of the revised draft articles to its sixty-second session.[1240]

B. Consideration of the topic at the present session

113. At the present session, the Commission had before it the draft articles on protection of the human rights of persons who have been or are being expelled, as revised and restructured by the Special Rapporteur (A/CN.4/617); the new draft workplan presented by the Special Rapporteur with a view to structuring the draft articles (A/CN.4/618); and the sixth report presented by the Special Rapporteur (A/CN.4/625 and Add.1). It considered them at its 3036th meeting, on 3 May 2010, its 3038th to 3041st meetings, on 5, 6, 7 and 10 May 2010, its 3044th meeting, on 14 May 2010, and its 3062nd to 3066th meetings, on 9, 13, 14, 15 and 16 July 2010. The Commission likewise had before it comments and information received from Governments.[1241]

114. At its 3040th meeting, on 7 May 2010, the Commission decided to refer to the Drafting Committee draft articles 8 to 15 on protection of the human rights of persons who have been or are being expelled, originally contained in the fifth report (A/CN.4/611), as revised and restructured by the Special Rapporteur in document A/CN.4/617.

115. At its 3066th meeting, on 16 July 2010, the Commission decided to refer to the Drafting Committee draft articles A and 9, as contained in the sixth report of the Special Rapporteur (A/CN.4/625), and draft articles B1 and C1, as contained in the addendum to the sixth report (A/CN.4/625/Add.1), as well as draft articles B[1242] and A1,[1243] as revised by the Special Rapporteur during the session.

1. Consideration of the revised and restructured draft articles on protection of the human rights of persons who have been or are being expelled

(a) *Presentation of the draft articles by the Special Rapporteur*

116. The Special Rapporteur explained that the Commission's consideration of the fifth report on expulsion of aliens (A/CN.4/611) had revealed a lack of understanding of what he himself meant to say about protection of the human rights of persons who had been or were being expelled as a limitation of the State's right to expel aliens. The wish was expressed that draft article 8, as proposed in the fifth report, be reformulated so as to clearly state the principle that the human rights of persons who had been or were being expelled should be fully protected. In addition, changes were proposed to other draft articles on the subject. The Commission had then asked the Special Rapporteur to submit to it a new version of the draft articles, taking account of the comments made during the debate. The Special Rapporteur had acceded to this request during the sixty-first session by revising the draft articles in question and incorporating them in document A/CN.4/617 and by restructuring them into four sections dealing, respectively, with "General rules", "Protection required from the expelling State", "Protection in relation to the risk of violation of human rights in the receiving State" and "Protection in the transit State".

[1240] *Ibid., Sixty-fourth Session No. 10* (A/64/10), para. 91.

[1241] See A/CN.4/604 and A/CN.4/628.

[1242] See footnote 1260 below.

[1243] See footnote 1269 below.

117. Section A, on "General rules", comprised the revised versions of draft articles 8, 9 and 10. In revised draft article 8,[1244] entitled "General obligation to respect the human rights of persons who have been or are being expelled", the expression "fundamental rights" had been replaced by the broader and non-limitative term "human rights". In addition, the phrase "in particular those mentioned in the present draft articles" had been added in order to emphasize not only that there was no intention to establish a hierarchy among the human rights to be respected in the context of expulsion but also that the rights specifically mentioned in the draft articles were not exhaustive.

118. Revised draft article 9,[1245] which corresponded to former draft article 10 and was entitled "Obligation to respect the dignity of persons who have been or are being expelled", had been incorporated into the section on "General rules" in order to emphasize that it was general in scope. Since the right to dignity was being considered in the specific context of expulsion, paragraph 1 of former draft article 10 setting forth the general rule that human dignity was inviolable had been eliminated.

119. Revised draft article 10,[1246] entitled "Obligation not to discriminate [Non-discrimination rule]", corresponded to former draft article 14. It had also been incorporated into the section on "General rules" in order to emphasize that it was general in scope. The words "among persons who have been or are being expelled" had been added to take into account the comments of several members of the Commission who had stressed that, in that context, the discrimination prohibited was discrimination among aliens subject to expulsion, not discrimination between such aliens and the nationals of the expelling State.

120. Section B on "Protection required from the expelling State" comprised revised draft articles 11, 12 and 13 and a future draft article which the Special Rapporteur was planning to produce on the conditions of custody and treatment of persons who had been or were being expelled. Revised draft article 11,[1247] entitled "Obligation to protect the lives of persons who have been or are being expelled", combined paragraph 1 of former draft article 9 and paragraph 1 (which here became paragraph 2) of former draft article 11. The

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[1244] Revised draft article 8 read:

Obligation to respect the human rights of persons who have been or are being expelled

Any person who has been or is being expelled is entitled to respect for his or her human rights, in particular those mentioned in the present draft articles.

[1245] Revised draft article 9 read:

Obligation to respect the dignity of persons who have been or are being expelled

The dignity of a person who has been or is being expelled must be respected and protected in all circumstances.

[1246] Revised draft article 10 read:

Obligation not to discriminate [Non-discrimination rule]

1. The State shall exercise its right of expulsion with regard to the persons concerned without discrimination of any kind on grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Such non-discrimination among persons who have been or are being expelled shall also apply to the enjoyment of the rights and freedoms provided for in international human rights law and in the legislation of the expelling State.

[1247] Revised draft article 11 read:

Obligation to protect the lives of persons who have been or are being expelled

1. The expelling State shall protect the right to life of a person who has been or is being expelled.

2. A State may not, in its territory or in a territory under its jurisdiction, subject a person who has been or is being expelled to torture or to inhuman or degrading treatment.

rearrangement was meant to respond to the strongly expressed desire of some members of the Commission to differentiate the obligations of the expelling State from those of the receiving State. The phrase "in a territory under its jurisdiction" had been added in order to take into account the concerns expressed by other members.

121. Revised draft article 12,[1248] entitled "Obligation to respect the right to family life", corresponded to former draft article 13. The reference to private life had been eliminated from the draft article, as some members of the Commission wished. Moreover, as other members had proposed, in paragraph 2 the reference to the "law" had been changed to read "international law".

122. The purpose of revised draft article 13,[1249] entitled "Specific case of vulnerable persons", was to extend to all "vulnerable persons" the protection which the former draft article 12 had reserved for children being expelled. While paragraph 1 specified what persons were meant, paragraph 2 was new and replaced paragraph 2 of the former draft article. It stressed that where a child was involved in expulsion the child's best interests must prevail; in some cases the child's best interests might require the child to be detained in the same conditions as an adult so that the child was not separated from the adult.

123. Revised draft articles 14 and 15 constituted section C on "Protection in relation to the risk of violation of human rights in the receiving State".

124. Revised draft article 14,[1250] entitled "Obligation to ensure respect for the right to life and personal liberty in the receiving State of persons who have been or are being expelled", was a reformulation of former draft article 9, particularly paragraph 1 thereof. The Special Rapporteur had endeavoured to take account of the desire expressed by some members of the Commission to extend the scope of the protection of the right to life to all expelled

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[1248] Revised draft article 12 read:

Obligation to respect the right to family life

1. The expelling State shall respect the right to family life of a person who has been or is being expelled.

2. It may not derogate from the right referred to in paragraph 1 of the present article except in such cases as may be provided for by international law and shall strike a fair balance between the interests of the State and those of the person in question.

[1249] Revised draft article 13 read:

Specific case of vulnerable persons

1. Children, older persons, persons with disabilities and pregnant women who have been or are being expelled shall be considered, treated and protected as such, irrespective of their immigration status.

2. In particular, any measure concerning a child who has been or is being expelled must be taken in the best interests of the child.

[1250] Revised draft article 14 read:

Obligation to ensure respect for the right to life and personal liberty in the receiving State of persons who have been or are being expelled

1. No one may be expelled or returned (*refoulé*) to a State where his or her right to life or personal liberty is in danger of being violated because of his or her race, religion, nationality, membership of a particular social group or political opinions.

2. A State that has abolished the death penalty may not expel an alien who is under a death sentence to a State in which that person may be executed without having previously obtained an assurance that the death penalty will not be carried out.

3. The provisions of paragraphs 1 and 2 of this article shall also apply to the expulsion of a stateless person who is in the territory of the expelling State.

persons. That provision, of general scope, also covered the situation of asylum-seekers, which therefore no longer required special treatment. Some members wanted the scope of the principle of *non-refoulement* to be extended to all persons who had been or were being expelled, whether or not they were lawfully present. The principle of *non-refoulement*, which had first been a fundamental principle of international refugee law, had then passed beyond the bounds of that branch of the law to become part of international humanitarian law and an integral part of the international human rights protection. In the opinion of the Special Rapporteur, the arguments drawn from various universal legal instruments and from converging regional legal regimes offered a sufficient basis for the rule set forth in draft article 14, paragraph 1.

125. Despite the preference expressed by some members for a formulation tending towards abolition of the death penalty, the Special Rapporteur did not believe that such changes should be made to draft article 14, paragraph 2, for the reasons explained in paragraph 58 of his fifth report (A/CN.4/611). Paragraph 3, which extended the protection in question to stateless persons, had been added to address a concern expressed in the Commission.

126. Revised draft article 15,[1251] entitled "Obligation to protect persons who have been or are being expelled from torture and inhuman or degrading treatment", corresponded to former draft article 11, which had been divided into two because some members of the Commission had felt the need to draw a distinction between the protection of the human rights of an alien who had been or was being expelled in the expelling State and the protection required in the receiving State. The new text of draft article 15 therefore drew on paragraphs 2 and 3 of the former draft article 11, with the addition in draft article 15, paragraph 2, of the phrase "and when the authorities of the receiving State are not able to obviate the risk by providing appropriate protection", in order to reflect the jurisprudence of the European Court of Human Rights in the case of *H.L.R. v. France*.[1252]

127. Lastly draft article 16,[1253] entitled "Application of the provisions of this chapter in the transit State", was new and sought to extend the set of provisions protecting the rights of the expelled person to the entire expulsion process and the whole of the journey from the expelling State to the receiving State.

(b) *Summary of the debate*

128. Several members supported the revised draft articles on protection of the human rights of persons who had been or were being expelled, in which the Special Rapporteur had taken into consideration most of the comments made during the discussion at the

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[1251] Revised draft article 15 read:

> **Obligation to protect persons who have been or are being expelled from torture and inhuman or degrading treatment**
>
> 1. A State may not expel a person to another country where there is a real risk that he or she would be subjected to torture or to inhuman or degrading treatment.
>
> 2. The provisions of paragraph 1 of this article shall also apply when the risk emanates from persons or groups of persons acting in a private capacity and when the authorities of the receiving State are not able to obviate the risk by providing appropriate protection.

[1252] European Court of Human Rights (Grand Chamber), *H.L.R. v. France*, judgment of 29 April 1997, paragraph 40.

[1253] Draft article 16 read:

> **Application of the provisions of this chapter in the transit State**
>
> The provisions of this chapter shall also apply in the transit State to a person who has been or is being expelled.

Commission's sixty-first session. It was pointed out, however, that there was still a need for caution with regard to the level of protection that should be granted to individuals in the draft articles, since the Commission was required to set forth principles of general international law and not to draw up an instrument for protecting human rights which each State would be free to accept or reject.

129. With regard to draft article 9 on the obligation to respect the dignity of persons who had been or were being expelled, some members reiterated their view that human dignity was a general principle from which all human rights flowed and not a specific human right. It was suggested that the requirement that dignity must be respected should be laid down in an introductory section of the draft articles, perhaps among the principles. Reference was also made to the fact that some aspects of protection of dignity were covered in draft article 11, paragraph 2, which prohibited torture and inhuman or degrading treatment. According to another viewpoint, the concept of dignity was of particular importance in the context of expulsion, for aliens awaiting expulsion were frequently subjected to offences against their dignity that did not necessarily amount to the violation of a specific human right. With respect to the wording of draft article 9, it was emphasized that the dignity referred to in that context was the same for every human being and should not be confused with individual perceptions of honour or pride, which could vary from one person to another. Hence it was proposed that draft article 9 should reproduce the wording of article 10 of the International Covenant on Civil and Political Rights and refer to "respect for the inherent dignity of the human person".

130. In connection with draft article 10 on non-discrimination, it was pointed out that the revised version failed to take due account of the concerns of certain members of the Commission who thought there could be legitimate reasons for treating different groups of aliens differently in the context of expulsion: for example, citizens of member and non-member States of the European Union, or aliens covered by readmission agreements. It was suggested that the possibility of "positive discrimination" based on the existence of rules on the free movement of persons should be recognized in the commentary. Some doubts were also expressed about the meaning and scope of paragraph 2. In particular it was noted that different expulsion procedures might apply depending on whether or not the alien was lawfully present in the territory of the expelling State.

131. With regard to draft article 11, it was suggested that it was important to ensure that the obligation of States to respect and guarantee respect for human rights was not limited to areas where they exercised territorial jurisdiction. More generally, it was suggested that the references to the notion of "territory" and "jurisdiction" be clarified.

132. With reference to draft article 12, it was pointed out that the phrase "such cases as may be provided for by international law" was rather vague.

133. With regard to draft article 14, some members proposed strengthening the protection contained in paragraph 2. It was again proposed to extend the protection afforded by that paragraph to cases where a death sentence had not been passed on a given alien but there was a risk that it might be imposed in the receiving State. In addition, doubts were expressed about the need for a paragraph 3 specifically referring to stateless persons.

134. With respect to draft article 15, doubts were expressed about what was regarded as the excessively broad wording of paragraph 2, which referred to situations in which the risk of torture or cruel, inhuman or degrading treatment emanated from persons acting in a private capacity.

2. Consideration of the sixth report of the Special Rapporteur

(a) *Presentation of the Special Rapporteur*

135. The sixth report (A/CN.4/625 and Add.1) continued with the study of the "General rules"; addendum 1 dealt with the procedural rules for expulsion. Concerning, in particular, the analysis of national legislation, the Special Rapporteur had relied on the Secretariat's study on the topic (A/CN.4/565 and Corr.1).

136. The Special Rapporteur had first reverted to the question of collective expulsion in order to allay certain misgivings expressed by some members with regard to draft article 7, paragraph 3, proposed in the third report (A/CN.4/581) and referred by the Commission to the Drafting Committee in 2007.[1254] This provision confined the possibility of collective expulsion of foreign nationals of a State engaged in armed conflict to those who "taken together as a group, … have demonstrated hostility towards the receiving State". Having analysed the relevant provisions of the Geneva Conventions of 12 August 1949 and the 1977 Additional Protocols thereto, the Special Rapporteur had arrived at the conclusion that the provision did not contradict international humanitarian law.

137. The sixth report then addressed the issue of "disguised expulsion", a term used in that context to describe situations where a State aided or tolerated acts committed by its citizens with the intended effect of driving a person out of its territory or provoking the departure of that individual. That type of expulsion was by its nature contrary to international law because it violated the human rights of the person so expelled and did not respect the procedural rules giving the expelled person an opportunity to defend his or her rights. Paragraph 1 of draft article A[1255] accordingly prohibited disguised expulsion, as defined in paragraph 2.

138. The sixth report also dealt with the issue of extradition disguised as expulsion. As part of the progressive development of international law, draft article 8[1256]established the prohibition of that practice, which had been condemned by a number of national courts and by the European Court of Human Rights in its judgment in the *Bozano* case.[1257] It should be noted, however, that extradition disguised as expulsion presupposed that the main reason for expulsion was extradition; in other words, expulsion sought to circumvent the provisions of domestic law that permitted the legality of an extradition to be contested. National case law in the matter was based on the purpose of the expulsion and on the intention of the States concerned.

[1254] For the text, see *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), footnote 400.

[1255] Draft article A read:

Prohibition of disguised expulsion

1. Any form of disguised expulsion of an alien shall be prohibited.

2. For the purposes of this draft article, disguised expulsion shall mean the forcible departure of an alien from a State resulting from the actions or omissions of the State, or from situations where the State supports or tolerates acts committed by its citizens with a view to provoking the departure of individuals from its territory.

[1256] Draft article 8 read:

Prohibition of extradition disguised as expulsion

Without prejudice to the standard extradition procedure, an alien shall not be expelled without his or her consent to a State requesting his or her extradition or to a State with a particular interest in responding favourably to such a request.

[1257] European Court of Human Rights, *Bozano v. France*, judgment of 18 December 1986, paragraph 60.

139. The sixth report then discussed at length the grounds for expulsion. The grounds embodied in international conventions and international case law appeared to be limited basically to public order and national security, although national legislation provided for various other grounds. In addition, international case law yielded little information about the content of the notions of public order and national security, which were very largely determined by domestic law. In those circumstances, the Special Rapporteur considered that to draw up an inventory of the grounds for expulsion that was meant to be exhaustive would be to attempt the impossible. Nevertheless, he had examined the criteria for assessing the grounds for expulsion on the basis of national, regional and international jurisprudence and doctrine.

140. In the light of those considerations, the Special Rapporteur had proposed a draft article 9[1258] that dealt with various aspects of the grounds for expulsion and their assessment, which probably warranted clarification in the commentary. Paragraph 1 established the requirement that grounds must be given for any expulsion decision. Paragraph 2 designated public order and national security as grounds that might justify the expulsion of an alien, while specifying that expulsion had to be carried out in accordance with the law. Paragraph 3 stated that the ground given had to be in conformity with international law. Lastly, paragraph 4 listed certain requirements for the State's determination of the ground for expulsion: it must be done in good faith and reasonably, taking into account the seriousness of the facts and the contemporary nature of the threat to which they gave rise, in the light of the circumstances and of the conduct of the person in question.

141. The sixth report also addressed the conditions in which persons being expelled were detained. Initially, draft article B[1259] had been entitled "Obligation to respect the human

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[1258] Draft article 9 read:

Grounds for expulsion

1. Grounds must be given for any expulsion decision.

2. A State may, in particular, expel an alien on the grounds of public order or public security, in accordance with the law.

3. A State may not expel an alien on a ground that is contrary to international law.

4. The ground for expulsion must be determined in good faith and reasonably, taking into account the seriousness of the facts and the contemporary nature of the threat to which they give rise, in the light of the circumstances and of the conduct of the person in question.

[1259] Draft article B, as contained in the sixth report, read:

Obligation to respect the human rights of aliens who are being expelled or are being detained pending expulsion

1. The expulsion of an alien must be effected in conformity with international human rights law. It must be accomplished with humanity, without unnecessary hardship and subject to respect for the dignity of the person concerned.

2. (a) The detention of an alien pending expulsion must be carried out in an appropriate place other than a facility in which persons sentenced to penalties involving deprivation of liberty are detained; it must respect the human rights of the person concerned.

(b) The detention of an alien who has been or is being expelled must not be punitive in nature.

3. (a) The duration of the detention may not be unrestricted. It must be limited to such period of time as is reasonably necessary for the expulsion decision to be carried out. All detention of excessive duration is prohibited.

(b) The extension of the duration of the detention may be decided upon only by a court or a person authorized to exercise judicial power.

rights of aliens who are being expelled or are being detained pending expulsion" and had comprised four paragraphs. However, during the session the Special Rapporteur had decided to submit to the Commission a revised version of the draft article[1260] in which the title was amended and paragraph 1 deleted. The purpose of those changes was to limit the scope of the provision to detention pending expulsion in order to avoid any duplication with the draft articles that set forth, in a general manner, the obligation to respect the human rights and the dignity of the person who had been or was being expelled.[1261] Draft article B codified rules that had either been expressly established in certain international legal instruments, embodied in international, albeit regional case law, or recognized by most national legislation.

142. In an addendum to his sixth report (A/CN.4/625/Add.1), the Special Rapporteur had examined the question of expulsion proceedings. In that context, he had first tackled the distinction between aliens lawfully or unlawfully present in the territory of the State, a distinction that was based, at least implicitly, on a number of international conventions and was widely established in State practice. In the opinion of the Special Rapporteur, while that distinction was indisputably relevant as far as procedural rules were concerned, it should not come into play with respect to the human rights of expelled persons.

143. Since the procedures applicable to the expulsion of aliens unlawfully present in the territory of the expelling State varied considerably from one State to another, the Special Rapporteur had arrived at the conclusion that it was better to leave them to be regulated by national legislation, without prejudice to a State's right to provide such aliens with the same guarantees as those for aliens lawfully present on its territory. That was the meaning of draft article A1[1262] which, subject to that proviso, restricted the scope of the subsequent draft articles to aliens lawfully present in the territory of the expelling State.

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4. (a) The decision to place an alien in detention must be reviewed periodically at given intervals on the basis of specific criteria established by law.

(b) Detention shall end when the expulsion decision cannot be carried out for reasons that are not attributable to the person concerned.

[1260] The revised version of draft article B read:

Obligation to respect the human rights of an alien being detained pending expulsion

1. (a) The detention of an alien pending expulsion must be carried out in an appropriate place other than a facility in which persons sentenced to penalties involving deprivation of liberty are detained; it must respect the human rights of the person concerned.

(b) The detention of an alien who had been or is being expelled must not be punitive in nature.

2. (a) The duration of the detention may not be unrestricted. It must be limited to such period of time as is reasonably necessary for the expulsion decision to be carried out. All detention of excessive duration is prohibited.

(b) The extension of the duration of the detention may be decided upon only by a court or a person authorized to exercise judicial power.

3. (a) The decision to place an alien in detention must be reviewed periodically at given intervals on the basis of specific criteria established by law.

(b) Detention shall end when the expulsion decision cannot be carried out for reasons that are not attributable to the person concerned.

[1261] These were draft articles 8 and 9 in their revised wording as presented by the Special Rapporteur in document A/CN.4/617; see footnotes 1244 and 1245 above.

[1262] Draft article A1 read:

Scope of [the present] rules of procedure

1. The draft articles of the present section shall apply in case of expulsion of an alien legally

144. The guarantees set out in draft articles B1 and C1 for lawfully present aliens had been drawn from various universal and regional human rights instruments, among which special mention had to be made of article 13 of the International Covenant on Civil and Political Rights. Draft article B1[1263] established the fundamental guarantee that expulsion could take place only pursuant to a decision reached in accordance with the law. That guarantee, which was embodied in universal and regional instruments and in the national legislation of several countries, also rested on the principle that the State was bound to observe its own rules (*patere legem* or *patere regulam quam fecisti*).

145. Aliens lawfully in the territory of the expelling State also enjoyed a certain number of procedural rights listed in draft article C1.[1264] Most of those guarantees had their source not only in national laws, but also in treaty law. Although treaty law and international jurisprudence did not specifically provide a basis for legal aid, the right to such aid was established in the national legislation of several States and also in European Union law. It had been included in the list in draft article C1 by way of progressive development. The right to translation and interpretation could be described as a generally recognized principle in court proceedings.

146. The Special Rapporteur also announced that he had finalized a second addendum to his sixth report which would deal with the legal consequences of expulsion and could be considered by the Commission at its sixty-third session (2011).

(b) *Summary of the debate*

147. As far as methodology was concerned, it was suggested that consideration should be given to the possibility of reorganizing the draft articles in five parts: a first part should determine the scope of the draft articles and define "expulsion"; the second could set forth the substantive conditions that had to be met if expulsion were to be internationally lawful; a third part would cover procedural matters; a fourth part could contain provisions

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[lawfully] in the territory of the expelling State.

2. Nonetheless, a State may also apply these rules to the expulsion of an alien who entered its territory illegally, in particular if the said alien has a special legal status in the country or if the alien has been residing in the country for some time.

[1263] Draft article B1 read:

Requirement for conformity with the law

An alien [lawfully] in the territory of a State Party may be expelled therefrom only in pursuance of a decision reached in accordance with law.

[1264] Draft article C1 read:

Procedural rights of aliens facing expulsion

1. An alien facing expulsion enjoys the following procedural rights:

(a) The right to receive notice of the expulsion decision.

(b) The right to challenge the expulsion [the expulsion decision].

(c) The right to a hearing.

(d) The right of access to effective remedies to challenge the expulsion decision without discrimination.

(e) The right to consular protection.

(f) The right to counsel.

(g) The right to legal aid.

(h) The right to interpretation and translation into a language he or she understands.

2. The rights listed in paragraph 1 above are without prejudice to other procedural guarantees provided by law.

concerning the property of the expelled person; and a fifth part could be devoted to the legal obligations of the States of transit and destination.

148. Although some doubts had been expressed about the relevance of some sources and the reliability of the some of the information used in the sixth report, the wealth and representative nature of the material used were also emphasized. It was nonetheless stated that the report could have paid more attention to the practice of States in certain regions of the world and to the views they expressed in international forums. It was noted that the lack of definitive findings that could be drawn from the sources consulted showed perhaps that the subject was not yet ripe for codification. It was therefore more a matter of identifying and recommending standards adopted in reasonably unequivocal practice. The view that the subject lent itself more to political negotiation than to an exercise in codification and progressive development was also reiterated.

149. It had been pointed out that caution was needed when dealing with the practice and case law in special regimes such as refugee law, regional mechanisms for protecting human rights or European Union law. Moreover it might be advisable to introduce a saving clause into the draft articles to indicate that their purpose was not to reduce the protection afforded by special regimes.

150. Several members supported draft article A concerning the prohibition of disguised expulsion, although some considered that the situations covered by that provision should be described in different terms. In that context, it was suggested that the terms "informal expulsion", "indirect expulsion", "*de facto* expulsion" or "constructive expulsion" might be used. The opinion was expressed, however, that the cases addressed in the sixth report in connection with that draft article varied widely; it would therefore be advisable to recast the provision using the premise that conduct whereby a State intended to provoke the expulsion of an alien must be treated as expulsion, irrespective of the form it took. According to a different point of view, the real problem that arose in the cases considered in the report stemmed from the violation of the procedural and substantive guarantees available to the person subject to expulsion. It would therefore be preferable to do no more than to include in the draft articles a provision setting forth the conditions that had to be met for the expulsion of an alien.

151. Several members endorsed the Special Rapporteur's opinion that disguised expulsion was by its nature contrary to international law, because it violated all the procedural guarantees and prevented the rights of the expelled person from being protected. It was further suggested that it should be made clear that the prohibition set out in draft article A also applied to States of transit and destination.

152. With regard to the definition of disguised expulsion contained in draft article A, paragraph 2, the expression "forcible departure" was criticized and it was emphasized that the prohibition in question should also cover situations in which an alien would be compelled — even without the use of physical force — to leave the territory of a State. Some members stressed that a distinction should be made between situations covered in that draft article and other situations, such as certain incentives to leave, which could not necessarily be treated as disguised expulsion. Again on the definition, it was pointed out that the words "actions or omissions" lacked clarity and did not draw an appropriate distinction between disguised expulsion and ordinary expulsion. It was also thought that the proposed definition went too far in that it also included situations, which were difficult to ascertain objectively, where a State "supports or tolerates acts committed by its citizens with a view to provoking the departure of individuals from its territory".

153. Some members supported draft article 8 contained in the sixth report, on the prohibition of extradition disguised as expulsion, as part of the progressive development of international law. It was pointed out that a provision on disguised extradition should be

included in the draft in that its purpose was to ban expulsion on grounds other than those that might normally warrant such a measure. The question was also raised whether the Special Rapporteur intended to deal with the merits of the principle of *male captus bene detentus*. Other speakers, however, queried the advisability of including the draft article, even by way of progressive development; they commented in particular that it was inappropriate to have in the draft articles a provision that was more concerned with extradition than with expulsion. Attention was drawn to the fact that that was all the more true as the aim of the proposed draft article was to protect the integrity of the extradition regime.

154. According to some members, draft article 8 as proposed by the Special Rapporteur was too broad in scope. The point was made that that form of expulsion was not categorically prohibited by case law, especially that of the European Court of Human Rights. It was therefore proposed that that provision should be worded in a narrower and more precise manner. According to one point of view, the scope of the provision should be restricted by a reference to the criterion of *intention*, in order to prohibit the use by a State of an expulsion procedure in order to circumvent the limitations on extradition resulting from that State's international obligations or its own laws. It was also proposed that the wording of the rule should be turned around to state that an alien could be expelled when the prerequisites for his or her expulsion were met, irrespective of the fact, or possibility, that the alien in question might be the subject of an extradition request.

155. Some members expressed their support for draft article 9. It was pointed out that paragraph 1, setting forth the requirement that grounds must be given for any expulsion decision, reflected an established rule of international law.

156. Some members also supported draft article 9, paragraph 2, which accorded particular importance to the grounds of public order and national security — without excluding other grounds — and also laid down the condition that expulsion must be in accordance with the law. It was pointed out that, while the grounds relating to public order and national security were certainly the most important, they were not the sole grounds, and that drawing up a supposedly exhaustive list of grounds for expulsion would unduly restrict the discretion that the expelling State must be allowed in order to determine those grounds. According to another view, it was doubtful that public order and national security could constitute the common denominator of all grounds for expulsion. Some members suggested the inclusion of a reference to other grounds, such as being convicted of a serious offence, unlawful entry, violation of major administrative rules and public health considerations. It was also proposed that it should be clearly stated that any expulsion had to rest on legitimate grounds and that any ground for expulsion had to be determined in accordance with the law.

157. A different viewpoint was that the grounds for expulsion should be limited to public order and national security, at least with a view to progressive development.

158. With regard to the grounds for expulsion, a number of speakers stressed the importance of the distinction between aliens lawfully and those unlawfully present in the territory of a State, a distinction that was frequently borne out by State practice. It was pointed out that the unlawful nature of an alien's presence in the territory of a State was a sufficient ground for expulsion under the legislation of many States, as long as the procedural guarantees envisaged under international and domestic law were observed.

159. It was suggested that more specifics should be provided, either in the text or in the commentary, on the grounds for expulsion that were contrary to international law. In particular, some speakers underlined the fact that "cultural" grounds for expulsion, which served to limit the number of foreign workers in a country, were prohibited by international law, as they violated the principle of non-discrimination. Mention was also made of the

unlawful nature of expulsion for purposes of reprisal, and it was suggested that expulsion on grounds of morality should be excluded.

160. A number of speakers endorsed draft article 9, paragraph 3, which stipulated that grounds for expulsion must be in conformity with international law, and the list of criteria for assessing the grounds for expulsion contained in paragraph 4 of the draft article.

161. Some speakers supported draft article B, on the conditions of detention of a person who had been or was being expelled. In particular, the facts that the draft article tackled, among other things, the serious problem of unrestricted or excessive duration of detention and that it set out procedural rules aimed at reinforcing assurances about conditions of detention for aliens were welcomed. According to other speakers, the rules set out in draft article B were not flexible enough or were too detailed: that was particularly the case with the requirement that the detention of an alien pending expulsion must be carried out in a place other than a facility in which persons sentenced to penalties involving deprivation of liberty were detained. It was also suggested that in some cases, aliens unlawfully present in a country might need to be detained with a view to establishing the facts, or even in order to protect such persons.

162. As regards the procedural rules relevant to expulsion, some members agreed with the Special Rapporteur that a distinction should be made between aliens legally (or lawfully) in a State's territory and aliens illegally (or unlawfully) in that territory. Some members pointed out that the distinction was grounded in various international instruments, international jurisprudence and national legislation and jurisprudence.

163. While some members supported draft article A1, several others thought that, in the context of expulsion, certain procedural guarantees must likewise be given to aliens unlawfully in the territory of the expelling State. It was pointed out that draft article A1, paragraph 2, was inadequate on that point, since by simply acknowledging that the expelling State had the right to extend certain procedural guarantees to certain aliens who were in its territory illegally, it was merely stating the obvious.

164. Among other things, it was suggested that aliens unlawfully in the territory of the expelling State should be accorded the right to a fair assessment of their conditions of expulsion by a competent authority. Several speakers were also of the view that draft article B1, under which a decision on expulsion must be reached in accordance with the law, should also apply to aliens unlawfully in the territory of the expelling State. Some speakers considered that certain procedural guarantees set out in draft article C1 should likewise be enjoyed by aliens in an unlawful situation. It was pointed out that that was true of the right to receive notice of the expulsion decision (even though differences might be provided for regarding the scope of that right), the right to a hearing, the right to translation and the right to consular protection. On the other hand, the view was expressed that international and national practice lacked the necessary elements to extend to aliens in an unlawful situation the right to effective remedies to challenge an expulsion decision. Another view was that it would be preferable to grant aliens in an unlawful situation the same procedural rights as those accorded to aliens lawfully present.

165. It was pointed out that the need to provide certain guarantees to all aliens stemmed from the very idea of the rule of law. It was also suggested that it was not always easy to distinguish between aliens lawfully or unlawfully present in the territory of the expelling State, including because the unlawful presence of an alien might be tolerated, and in certain cases encouraged, by the State in question. Moreover, some speakers thought that a distinction should be drawn between aliens unlawfully present for some time in the territory of the expelling State and aliens who had recently arrived, and that the former deserved a treatment somewhere between that given the latter and that given to aliens lawfully present, all the more so if their presence had been tolerated by the expelling State. Another view

held that the issue of whether to give more favourable treatment to aliens whose unlawful presence in the territory of the expelling State had lasted for a certain length of time fell solely within the purview of the domestic legislation of the State in question.

166. As to terminology, it was suggested that a definition of an "alien legally (or lawfully) in the territory of the expelling State" should be developed, based on the definition in addendum 1 to the sixth report,[1265] which referred to "an alien … who fulfils the conditions for entry or stay established by law in that State". In addition, some speakers stressed the need to avoid the use of potentially pejorative expressions such as "illegal (or unlawful) alien". It was, after all, only the presence of the alien in question in the territory of the State that could be described as illegal or unlawful.

167. It was also suggested that the draft articles should clearly indicate that a State was not entitled to change the status of an alien in order to avoid giving him or her the procedural guarantees enjoyed by aliens lawfully in its territory. Reference was made to the position of the Human Rights Committee, which considered that the rights accorded under article 13 of the International Covenant on Civil and Political Rights to aliens lawfully in the territory of the expelling State also applied if the legality of an alien's presence in the territory of the expelling State was disputed.[1266]

168. Several members supported in general terms draft article C1, which set out various procedural rights that were applicable to aliens who were lawfully present in the territory of the expelling State and were facing expulsion. Some members nevertheless considered that the exception concerning national security contained in article 13 of the International Covenant on Civil and Political rights should be incorporated in that provision.

169. Regarding the various procedural rights set forth in draft article C1, it was suggested that paragraph 1 (b) should refer to the right to challenge the expulsion *decision*, rather than the expulsion itself. As to consular protection, it was suggested that the commentary should cite article 5, subparagraph (e), of the 1963 Vienna Convention on Consular Relations and refer to the obligation of the State to inform a person facing expulsion of his or her right to consular protection. Regarding the right of access to effective remedies to challenge the expulsion decision without discrimination, it was pointed out that, in that context, non-discrimination must be construed as being among aliens, and not as implying any principle of national treatment.

170. Some members of the Commission were nevertheless of the view that certain procedural rights set forth in draft article C1 were not well established in international law. Such was the case, in their view, with the right to legal aid, which might create financial difficulties for certain States. It was suggested that this guarantee should be viewed as a matter of national treatment: insofar as mechanisms for legal aid existed in the expelling State, an alien must have access to them on a non-discriminatory basis. Another proposal was that draft article C1 should ensure provision for legal aid to the greatest extent possible, taking into consideration the resources of the expelling State. It was also suggested that the right to a hearing in the context of an administrative procedure like expulsion, as well as the right to counsel and the right to translation and interpretation were also not established under international law.

[1265] See A/CN.4/625/Add.1, para. 15 (c).

[1266] Human Rights Committee, general comment No. 15: The position of aliens under the Covenant, 11 April 1986, paragraph 9: "However, if the legality of an alien's entry or stay is in dispute, any decision on this point leading to his expulsion or detention ought to be taken in accordance with article 13."

171. Some speakers felt that the interpretation of article 13 of the International Covenant on Civil and Political Rights justified the inclusion of the right to the suspension of the execution of an expulsion decision until that decision became definitive, absent compelling reasons of national security.

172. Lastly, the insertion of the word "including" in the chapeau to draft article C1, paragraph 1, was proposed in order to stress the non-exhaustive nature of the list of procedural rights set out in that provision.

(c) *Special Rapporteur's concluding remarks*

173. The Special Rapporteur reacted to a number of general comments that had been made during the debate. In response to the remark that the topic was more suited for political negotiation than for an exercise of codification and progressive development, he observed that all the topics considered by the Commission were in reality, and with no exception, possible subjects of negotiations. The Special Rapporteur recalled that the methodology adopted in his reports was firstly to examine the sources of international law recognized in article 38 of the Statute of the International Court of Justice; only in the absence of a rule derived from one or the other of those sources could domestic practice serve as a basis for proposing draft articles as a matter of progressive development. Replying to certain criticisms of his use of sources and examples in his sixth report, the Special Rapporteur explained that he had tried to make the best use of the material available, the sources of which had always been clearly cited, and that he had expressly stated in his report that the cases cited were not comprehensive and certainly not intended to stigmatize the countries mentioned. Based on available information, the Special Rapporteur had also attempted to take into account the jurisprudence of several regions as well as the positions and practice of States belonging to various regions of the world. Finally, the consideration of old sources — some of which appeared to be unavoidable — was in no way anachronistic; it aimed at providing an account of the evolution of the topic.

174. Concerning the proposal aimed at restructuring the draft articles, the Special Rapporteur was of the view that it would be better, at this stage, to continue working on the basis of the revised workplan contained in document A/CN.4/618; once all the draft articles had been elaborated, it would be appropriate to restructure, in a coherent and logical way, the whole set of draft articles.

175. Concerning draft article A on disguised expulsion, he was not necessarily opposed to the replacement, in French, of the expression "disguised expulsion" by an equivalent of the English expression "constructive expulsion", which was well entrenched in arbitral awards, as long as the equivalent could be found. While recognizing that paragraph 2 could be deleted since it duplicated the definition of expulsion in draft article 2 proposed in his second report (A/CN.4/573), the revised version of which[1267] was sent to the Drafting Committee in 2007, the Special Rapporteur remained convinced of the need for a draft article prohibiting that form of expulsion, which violated all the procedural rules and afforded no protection to persons subject to expulsion.

176. The Special Rapporteur did not agree with those members of the Commission who thought that draft article 8, on extradition disguised as expulsion, went beyond the scope of the draft. However, in order to take account of the comments made by some members, he had proposed a revised version of that article.[1268]

[1267] See footnote 1236 above.

[1268] The revised version of draft article 8 read:

Expulsion in connection with extradition

177. With regard to draft article 9, on grounds for expulsion, the Special Rapporteur was not in favour of the proposal to limit such grounds to public order and national security. The in-depth survey of the grounds for expulsion that he had carried out in the sixth report showed that it would be unwise to reduce all the grounds for expulsion to those two. It would be better to leave the matter open in draft article 9 by simply stating that the grounds in question must not be contrary to international law. He had taken note of the comments made about the contribution by the International Court of Justice to the clarification of the notion of national security, and the pertinent elements of that contribution would be reflected in the commentary.

178. While some members of the Commission had claimed that the wording of draft article B1 was too detailed, the guarantees set out in that provision were derived from the jurisprudence and related to the fact that expulsion and, consequently, detention with a view to expulsion, were not punitive in nature. Nevertheless, the Drafting Committee might be able to find a more general formulation.

179. Regarding the procedural guarantees relating to expulsion, the Commission had been favourable to the general outlines proposed in addendum 1 to the sixth report, including the need to differentiate between the case of aliens lawfully present in a State and that of those unlawfully present, and within the latter group, between aliens recently arrived in the expelling State and those who had been there for some time. Nevertheless, the Special Rapporteur was responsive to the desire expressed by some members of the Commission for certain procedural guarantees to be accorded to aliens unlawfully present in a State's territory, and he had subsequently prepared a revised version of draft article A1 in which a distinction was proposed concerning the extent of the procedural guarantees based on the length of the alien's presence in the territory of the expelling State.[1269] Whereas paragraph 1 granted all aliens who had illegally entered the territory of the expelling State at a recent date the minimum guarantee that expulsion must take place in accordance with the law, paragraph 2 was intended to offer certain specific guarantees to an alien who was unlawfully in an expelling State but who had a special legal status in the country or had been residing there for some time (a period of six months might be envisaged for that purpose).

180. In the light of the reformulation of draft article A1, the Special Rapporteur thought it preferable not to change the text of draft article B1 through the deletion, as suggested by

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Expulsion of a person to a requesting State or to a State with a particular interest in the extradition of that person to the requesting State may be carried out only where the conditions of expulsion are met in accordance with international law [or with the provisions of the present draft article].

[1269] The revised version of draft article A1 read:

Draft article A1: Procedural guarantees for the expulsion of illegal aliens in the territory of the expelling State

1. The expulsion of an alien who entered illegally [at a recent date] the territory of the expelling State [or within a period of less than 6 months] takes place in accordance with the law.

2. The expulsion of an illegal alien who has a special legal status in the country or has been residing in the country for some time [at least six months] takes place in pursuance of a decision taken in conformity with the law and the following procedural rights:

(a) The right to receive notice of the expulsion decision.

(b) The right to challenge the expulsion decision.

(c) The right to a hearing.

(d) The right of access to effective remedies to challenge the expulsion decision.

(e) The right to consular protection.

some members of the Commission, of the word "lawfully": it was preferable not to depart from the text of article 13 of the International Covenant on Civil and Political Rights.

181. The Special Rapporteur noted that the principle behind draft article C1 had not been challenged and that it had simply been some guarantees that had been disputed. Whereas setting out the right to legal aid was certainly part of the progressive development of international law, the right to translation and interpretation was indisputably established, in the view of the Special Rapporteur, if only as a general principle of law.

182. The Special Rapporteur had taken note of the proposal to provide for appeal of an expulsion decision with suspensive effect. In his view, whereas that rule was established in European regional law, it was not part of general international law; thus, to incorporate it would be to engage in progressive development.

183. The Special Rapporteur had likewise noted the proposal to codify a rule, derived from the Human Rights Committee's interpretation of article 13 of the International Covenant on Civil and Political Rights, to the effect that the procedural guarantees that must be accorded to an alien lawfully in the territory of an expelling State also applied when the legality of the alien's presence in the territory was in dispute. Nevertheless, the Special Rapporteur considered that that point could be adequately reflected in the commentary.

Chapter VI
Effects of armed conflicts on treaties

A. Introduction

184. During its fifty-sixth session (2004), the Commission decided[1270] to include the topic "Effects of armed conflicts on treaties" in its programme of work, and to appoint Sir Ian Brownlie as Special Rapporteur for the topic.

185. At its fifty-seventh (2005) to sixtieth (2008) sessions, the Commission had before it the first to fourth reports of the Special Rapporteur (A/CN.4/552, A/CN.4/570 and Corr.1, A/CN.4/578 and Corr.1 and A/CN.4/589 and Corr.1, respectively), as well as a memorandum prepared by the Secretariat entitled "The effects of armed conflict on treaties: an examination of practice and doctrine" (A/CN.4/550 and Corr.1). The Commission further proceeded on the basis of the recommendations of a Working Group,[1271] chaired by Mr. Lucius Caflisch, which was established in 2007 and 2008 to provide further guidance regarding several issues which had been identified in the Commission's consideration of the Special Rapporteur's third report.

186. At its sixtieth session (2008), the Commission adopted on first reading a set of 18 draft articles, and an annex, on the effects of armed conflicts on treaties, together with commentaries. At the same session, the Commission decided, in accordance with articles 16 to 21 of its Statute, to transmit the draft articles, through the Secretary-General, to Governments for comments and observations.

187. At its sixty-first session (2009), the Commission appointed Mr. Lucius Caflisch as Special Rapporteur for the topic, following the resignation of Sir Ian Brownlie from the Commission.[1272]

B. Consideration of the topic at the present session

188. At the present session, the Commission had before it the first report of the Special Rapporteur (A/CN.4/627 and Add.1), containing his proposals for the reformulation of the draft articles as adopted on first reading, taking into account the comments and observations of Governments. The Commission also had before it a compilation of written comments and observations received from Governments (A/CN.4/622 and Add.1).

[1270] At its 2830th meeting, on 6 August 2004, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 364. The General Assembly, in paragraph 5 of its resolution 59/41 of 2 December 2004, endorsed the decision of the Commission to include the topic in its agenda. The Commission had, at its fifty-second session (2000), identified the topic "Effects of armed conflicts on treaties" for inclusion in its long-term programme of work. *Ibid., Fifty-fifth Session, Supplement No. 10* (A/55/10), para. 729. A brief syllabus describing the possible overall structure and approach to the topic was annexed to that year's report of the Commission. *Ibid.*, annex. In paragraph 8 of its resolution 55/152 of 12 December 2000, the General Assembly took note of the topic's inclusion.

[1271] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 324, and *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), paras. 58–60.

[1272] *Ibid, Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 229.

189. The Commission considered the Special Rapporteur's report at its 3051st to 3056th meetings, held from 26 May to 3 June 2010, as well as at the 3058th to 3061st meetings held from 5 to 8 July 2010.

190. At its 3056th meeting, on 3 June 2010, the Commission referred draft articles 1 to 12 to the Drafting Committee. The Commission further referred draft articles 13 to 17 to the Drafting Committee, at its 3061st meeting, on 8 July 2010.

1. General remarks on the topic

(a) Introduction by the Special Rapporteur

191. The Special Rapporteur paid tribute to the late Sir Ian Brownlie for his guidance of the work on the topic during its first reading, and observed that he intended to retain the broad outlines of the draft articles as were adopted in 2008. Accordingly, he stated a preference for focusing on the reactions of Member States to the first reading text, while introducing changes where necessary. He proposed to approach the topic in a reasonable, realistic and balanced manner which was based in practice and doctrine.

(b) Summary of the debate

192. General support was expressed for the methodology adopted in the preparation of the first report. It was suggested that increased emphasis be given to State practice. Other members noted that State practice is scarce and, at times, contradictory.

(c) Special Rapporteur's concluding remarks

193. The Special Rapporteur announced that he would endeavour to conduct additional research, with a view to identifying further State practice, when preparing the commentaries to the draft articles. He was also favourably disposed towards a proposal to organize the draft articles into a series of chapters.

2. Comments on the draft articles

Article 1
Scope[1273]

(a) Introduction by the Special Rapporteur

194. The Special Rapporteur observed that a key issue with draft article 1 was whether the draft articles should be applied solely to inter-State conflicts or also to non-international conflicts. He recalled that a majority of the Commission had favoured including non-international conflicts during the first reading, and that it had been observed, at the time, that the majority of contemporary armed conflicts fall within that category and if they were to be excluded, the draft articles would have only a limited scope. It was further observed that the draft articles adopted on first reading did raise the question of whether armed conflicts have different effects on treaties depending on whether they are international or not.

195. A further issue concerned the fate of treaties to which one or more intergovernmental organizations are parties. The Special Rapporteur recalled that the issue

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[1273] Draft article 1 read as follows:

Scope

The present draft articles deal with the effects of armed conflict in respect of treaties between States where at least one of these States is a party to the armed conflict.

had been set aside by the Commission at first reading, but some States had expressed a preference for extending the draft articles to those types of treaties, whereas other States opposed such extension. He observed that the inclusion of international organizations within the scope of the articles would require additional research which could take time and delay the Commission's work. He suggested, therefore, that the Commission follow a proposal, made by a State, that the possibility of studying the issue be reserved until after the completion of the work on the current draft articles.

196. Another issue was whether, as was suggested by one State, the Commission should further restrict the scope of application by excluding the situations of international conflict where only one State party to the treaty was a party to the conflict.

(b) Summary of the debate

197. Several members supported the inclusion of internal armed conflicts within the scope of application of the draft articles (as per draft article 2, subparagraph (b)). It was noted that it was not always possible clearly to distinguish between international and non-international armed conflicts. Others expressed doubts, not because of any disagreement on the significance of such conflicts, but rather out of a concern that their effect on treaties (if any) would be different from that arising from traditional inter-State conflict. The view was expressed that the effect of internal disturbances on the operation of a treaty was adequately covered by article 61 of the Vienna Convention on the Law of Treaties, on supervening impossibility of performance.

198. Support was expressed for the inclusion within the scope of application of the effect on a treaty where only one contracting State is a party to an armed conflict, which would, *inter alia*, accord with the inclusion of non-international armed conflicts. At the same time, the view was expressed that it was not clear that identical conclusions should be reached when only one State, which is a party to the treaty, is involved in the conflict (whether international or non-international). It was recommended that it be clarified why (and how) those cases of armed conflict should *as such* affect the operation of the treaty.

199. Different views were expressed regarding the exclusion from the scope of application of treaties to which international organizations are parties. Several members supported such exclusion, citing the complexities of dealing with international organizations in the draft articles and the fact that the topic was an outgrowth of the Vienna Convention on the Law of Treaties of 1969,[1274] which dealt solely with treaties between States. Reference was further made to the difference in governance structures within international organizations which may have implications for the effects of armed conflict on treaties.

200. Other members were of the view that it was necessary to include treaties to which international organizations were parties since it was not uncommon for international organizations to be involved in some capacity in armed conflicts. It was also considered extreme to exclude major international treaties from the scope of application of the draft articles simply because they have international organizations that are parties to them. It was accordingly maintained that the matter could, at least, be referred to in the commentaries. Other suggestions included introducing an appropriate saving clause, or initiating a separate study by the Commission at a later time, which could, for example, include a consideration of the extent to which the effect on such treaties is addressed by the rules of international organizations (or by analogy thereto), and by the decisions of their political organs.

[1274] United Nations, *Treaty Series*, vol. 1155, p. 331.

201. It was recalled that the question of treaties being provisionally applied, under article 25 of the Vienna Convention on the Law of Treaties, had been one of the issues pertaining to the scope of the draft articles raised during the first reading. A preference was expressed for not including such agreements within the scope of the draft articles.

(c) *Special Rapporteur's concluding remarks*

202. The Special Rapporteur noted that the debate had given rise to expected controversy, particularly around the inclusion of treaties to which international organizations are parties. He remained of the view that the issue was more complex than initially thought and that practice was scarce. It was not enough simply to note that international organizations do not go to war, and accordingly to conclude that treaties in which international organizations participate continue to be applicable during armed conflict. He remained inclined to accept the suggestion that a separate study on the matter be conducted.

203. Nonetheless, the question had been raised during the debate whether or not the draft articles would be applicable to major law-making conventions to which international organizations are also parties, such as the case of the United Nations Convention on the Law of the Sea, of 1982 (UNCLOS),[1275] to which the European Union had become a party.[1276] Under the formulation of draft article 1, such agreements would be excluded from the scope of application of the draft articles. The Special Rapporteur was of the view that such conclusion might need to be revisited, and proposed to draw a working distinction between treaties that concern international organizations (such as treaties which are constituent instruments and agreements conferring specific rights, such as privileges and immunities, on the Organization) and treaties to which international organizations are parties. In his view, the former category was clearly within the scope of the draft articles (and a proposal to include them as a distinct category in the annexed list was considered in the context of draft article 5). The difficulty related to the second category of treaties. In his view, the presence of an international organization as a contracting party to an international convention should not *per se* affect the relations between States parties to that treaty. He, accordingly, proposed the inclusion of the following new saving clause: "[t]he present draft articles are without prejudice to any rules of international law that regulate the treaty relations of international organizations in the context of armed conflict".

204. He observed further that the majority of the Commission continued to favour the inclusion of non-international armed conflict despite the difficulties that potentially arose from such inclusion.

205. The Special Rapporteur further took the opportunity to point out the various hypotheses of conflicts and parties covered by the draft article: (1) armed conflict between opposing parties, (2) armed conflict where contracting parties are allies, (3) a conflict where only one contracting party is a party to the armed conflict, and (4) a non-international armed conflict. The last two were similar but not identical. Such hypotheses were to be examined in the commentary.

[1275] United Nations, *Treaty Series*, vol. 1833, p. 3.

[1276] The European Union deposited its instrument of formal confirmation on 1 April 1998.

Article 2
Use of terms[1277]

(a) Introduction by the Special Rapporteur

206. The Special Rapporteur observed that the central difficulty in draft article 2 was defining "armed conflict". One aspect, already dealt with, was whether the term included non-international conflicts. In his view, the answer to that question was in the affirmative. A further problem was that the definition of the expression "armed conflict", contained in article 2, subparagraph (b), was circular by defining conflicts covered by the draft as being those which are likely to affect the application of treaties. Moreover, the first reading definition was *ad hoc* in nature, adopted for the purposes of the topic. It was preferable to choose a more neutral and generally valid definition. While he understood the underlying reasons for the suggestion, made by a State, that no definition be provided at all, he was of the view that the draft articles would no longer be viable and useful if there were no definition of this term (which also served to limit the scope of the draft articles).

207. Accordingly, while it was preferable to retain a definition, the Special Rapporteur proposed to reconsider the formulation adopted on first reading. There were two possibilities. The first was to combine article 2 of the Geneva Conventions of 1949[1278] and article 1, paragraph (1), of the 1977 Additional Protocol II dealing with non-international armed conflicts.[1279] Such solution would offer the advantage of using the same definition of "armed conflict" in the fields of international humanitarian law and the law of treaties. The disadvantage, however, was that it would be burdensome and also to a certain extent circular. The second option, was to turn to the more contemporaneous and concise definition used in 1995 by the International Criminal Tribunal for the Former Yugoslavia, in the *Tadić* decision.[1280] The Special Rapporteur noted that it reflected a more modern understanding of the concept, and was accordingly a preferable formulation, with the exclusion of the last clause dealing with armed force between organized armed groups within a State since the draft articles clearly only applied to situations involving at least one contracting State participating in the armed conflict.

[1277] Draft article 2 read as follows:

Use of terms

For the purposes of the present draft articles:

(a) "Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(b) "Armed conflict" means a situation in which there has been a resort to armed force between States or protracted resort to armed force between governmental authorities and organized armed groups.

[1278] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, United Nations, *Treaty Series*, vol. 75, p. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, United Nations, *Treaty Series*, vol. 75, p. 85; Geneva Convention relative to the Treatment of Prisoners of War, United Nations, *Treaty Series*, vol. 75, p. 135; and Geneva Convention relative to the Protection of Civilian Persons in Time of War, United Nations, *Treaty Series*, vol. 75, p. 287.

[1279] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), Geneva, 8 June 1977, United Nations, *Treaty Series*, vol. 1125, p. 609.

[1280] International Tribunal for the Former Yugoslavia, *Prosecutor v. Duško Tadić*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

208. As regards the possibility of the inclusion of a reference to occupation, while he recalled that, as had been pointed out by a Member State, the concepts of armed conflict and of occupation dealt with different realities, nonetheless, in his view, occupation was an integral part of an armed conflict, a point that would be confirmed in the commentary.

(b) *Summary of the debate*

209. A majority of members expressed support for the proposed reformulation of the definition of "armed conflict" along the lines of that adopted in the *Tadić* decision. It was noted that the definition in the *Tadić* case was more modern and had largely superseded that in the Geneva Conventions and Additional Protocol II thereto. It was also said to be a suitable replacement for the definition adopted on first reading, which was considered by some to be circular in nature, and that adopting a common definition was important for the unity of international law. It was further observed that the *Tadić* definition had the benefit of including non-international armed conflicts, which was necessary since most contemporary conflicts are non-international in nature.

210. Other members expressed a preference for the more traditional definition contained in the Geneva Conventions, as augmented by Additional Protocol II of 1977. It was maintained that there was a need for objective criteria in determining when an armed conflict had broken out, and it was proposed that, at a minimum, the commentary make the point that the application of the draft articles did not depend on the discretionary judgement of the parties, but that they applied automatically as soon as the material conditions contained therein were fulfilled. It was further stated that the first reading definition was more operational in nature, and included several valuable threshold elements, such as "nature and intensity", which the Special Rapporteur was proposing to delete in favour of an overly broad definition in the *Tadić* decision. The concern was expressed that the new definition could be interpreted to include any use of armed force, whether or not such use would have an impact on the application of treaties. According to another view, it was not necessary to include a definition of armed conflict at all.

211. A preference was expressed for the deletion (or, if retained, clarification) of the word "protracted" in the proposed new definition. Other members preferred to retain the word either not to change what has become an accepted definition, or so as to ensure that there is a minimum threshold, provided for in the element of duration and intensity, for the application of the draft articles. Accordingly, the draft articles would not apply to short spasms of conflict. It was clarified that the reference to "protracted" in the definition applied only to non-international armed conflict. Moreover, in order to be consistent with the definition in the *Tadić* case, the words "a situation in which there has been resort to armed force" should be replaced by "a situation in which there is resort to armed force".

212. Different views were expressed on the question of the inclusion of a reference to occupation. On the one hand, it was maintained that the issue was serious enough to warrant a reference in the definition of armed conflict itself, and that leaving it to the commentary would not clearly resolve the question of whether occupation was a form of armed conflict or not. Other members preferred to leave the matter for appropriate treatment in the commentary, since if the Commission were to deal with occupation in the draft articles, it would also have to consider other manifestations of armed conflict such as blockades and embargoes, which would make the definition unwieldy and complicated.

(c) *Special Rapporteur's concluding remarks*

213. The Special Rapporteur noted that key issues on the draft article related to the definition of armed conflict, including the question of the inclusion of non-international armed conflict. He recalled that the first reading text of the definition had not been unanimously agreed. His proposal to replace the definition with a formulation based on the

definition in the *Tadić* case seemed to have gained favour among the majority of the Commission, although some members did oppose it. He was of the view that the reference to "protracted" should be retained. On occupation, he continued to believe that it would occur during an armed conflict and, accordingly, was covered by the draft articles; thus it sufficed to make such a clarification in the commentary.

Article 3

Absence of a rule under which, in the event of an armed conflict, treaties are *ipso facto* terminated or suspended[1281]

(a) Introduction by the Special Rapporteur

214. In introducing draft article 3, the Special Rapporteur pointed out that draft articles 3 to 5, and the annex to article 5, were to be assessed in the light of, and jointly with, each other. He recalled that draft article 3 was based to a certain extent on article 2 of the resolution of the Institute of International Law of 1985[1282] dealing with the same issue. He pointed out that draft article 3 had been, on the whole, welcomed by Member States, even if some did try to assign to it several meanings. None had formally opposed the provision. The focus, therefore, was on its formulation. He recalled that one State had expressed a preference for an affirmative wording which would establish a presumption of survival of the treaty. To his mind, this would be a change in direction which could lead to a rethinking of the entire draft articles. Moreover, such an affirmation did not seem realistic. Therefore, he preferred maintaining the first reading formulation, with the possibility of reverting to the reference to "*ipso facto*" as certain States had suggested. He also recalled that some States had criticized the title as being obscure.

(b) Summary of the debate

215. General agreement was expressed for the rule contained in draft article 3. The focus of the discussion related to its formulation and nature. Thus, a preference was expressed for not using Latin terminology ("*ipso facto*"), in line with the Commission's practice of avoiding Latin where possible. There was general agreement that the title of the provision required reformulation, and a number of alternative formulations were proposed. It was also suggested that the provision itself be reformulated in more affirmative terms.

216. A difference of opinion emerged as to the nature of the provision. While some members considered it as establishing a presumption in favour of continuity, or a "general principle" of continuity, others were of the view that that did not reflect the content of the draft article which was more in the nature of a presumption against discontinuity as a consequence of the outbreak of armed conflict. It was further suggested that the relationship between draft articles 3, 4 and 5 needed to be clarified, even if only in the commentaries.

[1281] Draft article 3 read as follows:

Absence of *ipso facto* termination or suspension

The outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties as:

(a) Between States parties to the treaty that are also parties to the conflict;

(b) Between a State party to the treaty that is also a party to the conflict and a State that is a third State in relation to the conflict.

[1282] Resolution by the Institute of International Law on "The Effects of Armed Conflicts on Treaties" adopted on 28 August 1985, Session of Helsinki – 1985.

(c) *Special Rapporteur's concluding remarks*

217. The Special Rapporteur was of the view that the title should faithfully reflect the draft article's content, and since no presumption or general principle was being established, any such reference should be avoided. He further expressed incomprehension with the aversion to the use of Latin, which remained commonly used in international law. Nonetheless, he noted that satisfactory replacements for "*ipso facto*" could be found.

Article 4

Indicia of susceptibility to termination, withdrawal or suspension of treaties[283]

(a) *Introduction by the Special Rapporteur*

218. The Special Rapporteur noted that the first reading version of draft article 4 had been the object of significant debate within the Commission. He recalled that the end result was to include a reference to the interpretation of the treaty in line with articles 31 and 32 of the Vienna Convention on the Law of Treaties, which would provide an indication of the will of the authors of the treaty. This was supplemented by the indicia of the nature and extent of the armed conflict, its effect on the treaty, the subject matter of the treaty, and the number of parties to the treaty. Contrary to what certain States seemed to believe, these were to be resorted to in addition to the will of the parties and were not an elimination of that criterion.

219. He recalled that one of the comments on draft article 4 was that the reference to the effect of the armed conflict on treaties was circular, since the effect was the result to which the application of draft article 4 should lead rather than a criterion to achieve that result. Nonetheless, it was explained that it could be that the effect was one limited in time, i.e. that it could initially be a minor effect which could become significant were the conflict to be extended. Thus, the effect would vary over time and could affect the continuity of the treaty, thereby creating conditions which in the long term would make the survival of the treaty less likely.

220. He recalled that there were a variety of opinions among Member States as to the indicia in subparagraph (b), with some calling for the deletion of the reference to "the nature and scope of the armed conflict", while others preferred retaining such elements. The latter position accorded with his preference. Other Member States had suggested the addition of further indications, such as the change of circumstances, the impossibility of implementing the treaty, and the material breach thereof. In his view, such additions were inappropriate since they covered matters already settled by articles 60 to 62 of the Vienna Convention on the Law of Treaties. He also preferred not to include an express reference in the provision that the list of indicia was not exhaustive — a point made in the commentary — so as not to weaken the normative effect of the provision. Nonetheless, he did accept the suggestion that the reference to the "subject matter" of the treaty was not necessary since it

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[283] Draft article 4 read as follows:

Indicia of susceptibility to termination, withdrawal or suspension of treaties

In order to ascertain whether a treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict, resort shall be had to:

(a) The intention of the parties to the treaty as derived from the application of articles 31 and 32 of the Vienna Convention on the Law of Treaties; and

(b) The nature, extent, intensity and duration of the armed conflict, the effect of the armed conflict on the treaty and the number of parties to the treaty.

was referred to in draft article 5. The Special Rapporteur further considered a proposal to delete the reference to "withdrawal", but decided to retain it.

221. Finally, he was of the view

> that the mere reference to articles 31 and 32 of the Vienna Convention on the Law of Treaties was too elliptical, and that the text could be clearer if reference were made to the intention of the parties to the treaty, as evidenced by the application of articles 31 and 32.

(b) *Summary of the debate*

222. It was suggested that the relationship between draft articles 4 and 5 be clarified, since they represented opposite sides of the issue: draft article 4 dealt with the possibility of the operation of the treaty ceasing, while draft article 5 contemplated the continuation of treaties. It was also suggested that it be clarified why a reference to withdrawal was included in draft article 4, but not in draft article 3.

223. While support was expressed for resort, in subparagraph (a), to articles 31 and 32 of the Vienna Convention on the Law of Treaties in determining whether the treaty gives an answer to the question of what are the consequences of an armed conflict between the contracting States parties, opposition was expressed regarding the reintroduction of the criterion of the intention of the parties. It was recalled that that criterion had been the subject of extensive discussion during the first reading, and that it had been finally agreed to exclude any reference to it. Furthermore, it was noted that draft article 4 does not deal only with the interpretation of the treaty, but also with the question of what to do when the treaty does not provide an explicit indication as to what are the effects on the treaty of the outbreak of armed conflict. According to another view, not even a reference to articles 31 and 32 was appropriate, since such types of cross-references to other instruments should, as a rule, be avoided. It was also pointed out that those two articles did not necessarily apply to situations of armed conflict, and existed at the level of general rules; whereas the task of the Commission was to develop a set of draft articles which would operate as a *lex specialis* in relation to such general rules.

224. Other members expressed a willingness to include a reference to the intention of the parties since even though such intention was constructed, it was nonetheless common to find such references in international instruments, and would not, accordingly, pose any problems in the application of the draft articles. It was also noted that there existed a strong doctrinal basis for the inclusion of the reference to intention, and that, in the new formulation proposed by the Special Rapporteur, intention was not predominant, but merely one of the indicia. Some members preferred to consider intention of the parties to be the key criterion in draft article 4.

225. The view was expressed that the "subject matter" of the treaty was a useful guide and, accordingly, that it ought to be reintroduced in draft article 4, regardless of the fact that it appears in draft article 5. A similar view was that the reference to "subject matter" was the nexus between draft articles 4 and 5, and, accordingly, removing it from draft article 4 risked leading to an independent interpretation of each provision.

226. The view was further expressed that the new reference to the "intensity and duration of the conflict" did not add much as the terms were covered by the criterion of "nature and extent". It was observed that such indicia were unclear. The concern was also expressed that the reference in subparagraph (b) to the "effect of the armed conflict on the treaty" rendered the provision circular in meaning, and required explanation in the commentary. Nor, according to another view, was the number of parties necessarily a useful guide. A further view was expressed that an indication could be included in the provision that the list of indicia was only indicative, implying that there could be other relevant indicia arising

from the circumstances at hand. It was also suggested that the reference to "indicia" be replaced by "factors" or "criteria".

(c) Special Rapporteur's concluding remarks

227. The Special Rapporteur observed that there had been mixed support for his proposal to revert to an express reference to the intention of the parties to the treaties in the application of articles 31 and 32 of the Vienna Convention on the Law of Treaties. He recalled that some who had opposed it had pointed out that the application of articles 31 and 32 was not primarily aimed at determining the intention of the parties, but determining the content of the treaty. In order not to reopen the discussion on the subject, he proposed to return to the first reading formulation of the draft article. As regards the multiple references to the "subject matter" of the treaty (in draft articles 4 and 5), he maintained the view that one reference was sufficient.

Article 5 and annex
Operation of treaties on the basis of implication from their subject matter[1284]

(a) Introduction by the Special Rapporteur

[1284] Draft article 5 read as follows:

The operation of treaties on the basis of implication from their subject matter

[1.] In the case of treaties the subject matter of which involves the implication that they continue in operation, in whole or in part, during armed conflict, the incidence of an armed conflict will not as such affect their operation.

[2. Treaties relating to the law of armed conflict and to international humanitarian law, treaties for the protection of human rights, treaties relating to international criminal justice and treaties declaring, creating or regulating a permanent regime or status or related permanent rights, including treaties establishing or modifying land boundaries or maritime boundaries and limits, remain in or enter into operation in the event of armed conflict.]

Annex
Indicative list of categories of treaties referred to in draft article 5

[(a) Treaties relating to the law of armed conflict, including treaties relating to international humanitarian law;

(b) Treaties declaring, creating or regulating a permanent regime or status or related permanent rights, including treaties establishing or modifying land and maritime boundaries;]

[(c) Treaties relating to international criminal justice;]

(d) Treaties of friendship, commerce and navigation and analogous agreements concerning private rights;

[(e) Treaties for the protection of human rights;]

(f) Treaties relating to the protection of the environment;

(g) Treaties relating to international watercourses and related installations and facilities;

(h) Treaties relating to aquifers and related installations and facilities;

(i) Multilateral law-making treaties;

(j) Treaties establishing an international organization;

(k) Treaties relating to the settlement of disputes between States by peaceful means, including resort to conciliation, mediation, arbitration and the International Court of Justice;

(l) Treaties relating to commercial arbitration;

(m) Treaties relating to diplomatic and consular relations.

228. The Special Rapporteur observed that draft article 5, and the annex, had elicited many comments from Governments. As a general point, he recalled that the occurrence of an armed conflict, as such, never caused a treaty to come to an end; and the effect of an armed conflict could be that a treaty continued in whole or only in part. He further recalled that the list in the annex, which was to be read together with draft article 5, was indicative in nature.

229. The Special Rapporteur noted that it had been observed that draft article 5 lacked clarity, without explanation as to why that was the case. He noted, in response to the suggestion of a Member State that the Commission identify the factors that would determine if a treaty or some of its provisions would continue to be applicable, that that was precisely the function of draft articles 4 and 5, together with the list in the annex. He also disagreed with the assertion that draft article 5 was not necessary in light of the presence of a general provision in draft article 3. Draft articles 4 and 5, together with the annex, provided exogenous and endogenous indications for determining whether a treaty was to survive (whether in whole or in part) the outbreak of an armed conflict.

230. Reference was further made to a suggestion by a Member State that a second paragraph be added to draft article 5, which would expressly establish the applicability during armed conflict of treaties relating to the protection of human beings (international humanitarian law, human rights and international criminal law treaties), as well as the continued applicability of the Charter of the United Nations. While he was not necessarily opposed to the suggestion, the Special Rapporteur was of the view that it raised difficulties, relating, *inter alia*, to the delimitation of the scope of application between international humanitarian law and human rights treaties, the unclear extent of the general reference to "international criminal law", and whether it was necessary specifically to provide for the survival of the Charter of the United Nations, which by its very nature would continue in operation. He further expressed the concern that the inclusion of such a paragraph would inadvertently have the effect of establishing two "tiers" of categories, which might be difficult to substantiate in practice. Indeed, he wondered whether it would be possible to agree to limit the type of treaties in the paragraph to the proposed categories, and not to include, for example, treaties establishing borders. He observed that he had tentatively proposed the inclusion of such a second paragraph for the benefit of consideration by the Commission, and noted that if the Commission were to support the inclusion of such a paragraph, the corresponding deletions would have to be made to the list of categories in the annex.

231. As regards the retention in the annex of the list of categories of treaties the subject matter of which involved the implication that they continued in operation, he noted that the opinion of Member States was divided, as had been the case in the Commission. He recalled that the suggestions from States had ranged from incorporating the whole list in the draft articles under draft article 5, to reflecting it in the commentary. On balance, the Special Rapporteur was of the view that retaining the list in an annex to the draft articles, as had been done on first reading, was a viable compromise between those two positions.

232. Concerning the content of the list, the Special Rapporteur expressed support for the inclusion of treaties which are constituent instruments of international organizations, which would encompass the Charter of the United Nations. As regards a proposal to eliminate categories from the list (treaties of friendship, commerce and navigation and analogous agreements concerning private rights; treaties relating to the protection of the environment; treaties relating to watercourses and related installations and facilities; and treaties relating to commercial arbitration), the Special Rapporteur noted that while it might be true that those categories of agreements did not always survive in their totality, the list was merely indicative and the possibility of separability of individual provisions was established by

draft article 10. It was, therefore, neither necessary nor desirable to make the suggested deletions.

(b) Summary of the debate

233. Several members expressed support for the proposed inclusion of a new second paragraph in draft article 5. Others were of the view that it would lead to complexity by establishing different rules for different categories of treaties. It was also recommended that the proposed paragraph either be included in the annex itself, or be inserted as a separate provision in the draft articles.

234. As regards the categories of treaties listed in the annex, it was recommended that emphasis be placed on including those categories which found support in State practice. Suggestions for the inclusion of additional categories included: treaties including rules of a peremptory (*jus cogens*) nature, treaties concerning international criminal jurisdiction, treaties which are constituent instruments of international organizations as well as international boundary treaties. Doubts were expressed regarding the inclusion of categories of treaties, not all of which, according to that view, would continue in operation during armed conflict. It was further suggested that the categories in the list should follow an established logic.

235. As for the location of the list, several members expressed support for retaining it in an annex to the draft articles, so as to make draft article 5 more concrete. Another view was that the list was best placed in the commentary since its content did not enjoy universal support and retaining it in the text risked making it "rigid". It was stated that, as a general rule, draft articles should only include substantive provisions, and not examples.

(c) Special Rapporteur's concluding remarks

236. The Special Rapporteur noted that a proposal to merge the draft article with article 4, as well as a proposal to include a new second paragraph dealing with treaties relating to the protection of persons, did not enjoy the support of the majority in the Commission. He confirmed his intention to explain the relationship between articles 4, 5 and 6, as well as the meaning of the various indicia in articles 4 and 5, in the commentary.

237. As for the location of the list of categories of treaties, the Special Rapporteur noted that the preference of the Commission seemed to be in favour of retaining it as an annex to the draft articles, as was done on first reading, with the qualification that it be augmented by the following new categories: treaties which are constituent instruments of international organizations, treaties relating to international criminal justice, and treaties including rules of a peremptory (*jus cogens*) nature. He noted that there was no opposition to inserting the first two categories of treaties. Regarding *jus cogens* rules in treaties, he was of the view that the survival of such rules was not dependent on the effect of armed conflict on the treaty in which they were reproduced. Instead, they survived as customary international law rules of a specific category. As such, they were strictly speaking beyond the Commission's mandate.

238. In addition, he considered a proposal to adopt a descending scale order for the list of categories as being problematic, since such classification of categories of treaties could be arbitrary or difficult. He also recalled that, according to draft article 10, treaties were separable, and parts thereof could survive or not survive for different purposes. He also took note of a suggestion that the possibility of the modification of treaties be referred to in the draft articles.

Article 6
Conclusion of treaties during armed conflict[1285]

Article 7
Express provisions on the operation of treaties[1286]

(a) *Introduction by the Special Rapporteur*

239. The Special Rapporteur observed that draft article 6 contained two ideas: that the States parties to an armed conflict continued to be able to conclude agreements or treaties; and that those States could agree to put an end to treaties which otherwise would continue to apply. The amendments proposed to the first reading version were minimal.

240. Draft article 7 gave precedence to the indication in a treaty that it continued to apply in situations of armed conflict. While admittedly obvious, the Special Rapporteur nonetheless considered it useful to include the provision, albeit as draft article 3 *bis* since it referred to a treaty rule which derogated from the mechanism of draft articles 4 and 5.

(b) *Summary of the debate*

241. As regards draft article 6, support was expressed for a proposal made by a Member State that the provision be without prejudice to draft article 9. Some members expressed doubts about the reference to "lawful" agreements, in the second paragraph, and proposed that the term be replaced by a more general reference: "in accordance with the Vienna Convention on the Law of Treaties" or "in accordance with international law". It was also suggested that the double reference to "during an armed conflict" be removed by deleting the opening phrase.

242. General support was expressed for the Special Rapporteur's proposal to locate draft article 7 as draft article 3 *bis*. It was also suggested that the provision could be located as draft article 5 *bis*.

(c) *Special Rapporteur's concluding remarks*

243. The Special Rapporteur agreed with the drafting suggestions for draft article 6. He further observed that his proposal to locate draft article 7 as new draft article 3 *bis* had enjoyed general support in the Commission

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[1285] Draft article 6 read as follows:

Conclusion of treaties during armed conflict

1. The outbreak of an armed conflict does not affect the capacity of a State party to that conflict to conclude treaties in accordance with the 1969 Vienna Convention on the Law of Treaties.

2. During an armed conflict, States may conclude lawful agreements involving termination or suspension of a treaty or part of a treaty that is operative between them during situations of armed conflict.

[1286] Draft article 7 read as follows:

Express provisions on the operation of treaties

Where a treaty itself contains [express] provisions on its operation in situations of armed conflict, these provisions shall apply.

Article 8
Notification of termination, withdrawal or suspension[1287]

(a) Introduction by the Special Rapporteur

244. The Special Rapporteur recalled that draft article 8 had been introduced towards the end of the first reading, and that it had been the subject of much debate. The 2008 version could be criticized on two counts. First, contrary to article 65, paragraph 2, of the Vienna Convention on the Law of Treaties, no time frame was established for the formulation of objections to a notification. Secondly, the earlier version could have the consequence of preventing any solution being found by peaceful means that existed between the States involved in the armed conflict, particularly with third States not involved in the conflict. It was recalled that the Commission had felt that it was not realistic to seek to impose a regime of peaceful settlement of disputes. However, the Special Rapporteur believed that such position could be revisited.

245. The proposed new formulation for draft article 8 sought to deal with both issues by seeking inspiration from article 65 of the Vienna Convention on the Law of Treaties. The Special Rapporteur agreed with the view of a member State that it was not clear why the controversy between the notifying State and the objecting State should, where some means of dispute settlement was available, remain suspended to the end of the armed conflict. The matter depended also on the solution provided for the question of the introduction of a time frame for raising an objection to the notification. He recalled that article 65, paragraph 2, established a time frame of three months. He had, however, refrained from indicating a specific time frame because he felt that the time frame could be longer, since considering the fate of treaties may not be a priority for a State involved in an armed conflict.

246. The Special Rapporteur made reference to the query raised by a Member State as to the effect of the notifications made in draft article 8. To his mind, there were two possibilities. If no objection was received within the prescribed time frame, the notifying State could go ahead and put an end to the treaty, withdraw from it, or suspend it in whole or in part. Alternatively, if an objection was made and received then, where appropriate (and if available), the States concerned would resort to peaceful settlement means or mechanisms. He was of the view that it was not difficult to expect States to make notifications and objections while an armed conflict was going on. What was important was

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[1287] Draft article 8 read as follows:

Notification of intention to terminate, withdraw from or suspend the operation of a treaty

1. A State engaged in armed conflict intending to terminate or withdraw from a treaty to which it is a party, or to suspend the operation of that treaty, shall notify the other State party or States parties to the treaty, or its depositary, of that intention.

2. The notification takes effect upon receipt by the other State party or States parties, unless it provides for a subsequent date.

3. Nothing in the preceding paragraphs shall affect the right of a party to object, in accordance with the terms of the treaty or applicable rules of international law, to termination, withdrawal from or suspension of the operation of the treaty. Unless the treaty provides otherwise, the time limit for raising an objection shall be … after receipt of the notification.

4. If an objection has been raised within the prescribed time limit, the States parties concerned shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

5. Nothing in the preceding paragraphs shall affect the rights or obligations of States with regard to the settlement of disputes insofar as they have remained applicable, pursuant to draft articles 4 to 7, despite the incidence of an armed conflict.

to make clear that to the greatest extent possible the requirements of article 65, paragraphs 1 and 2, of the Vienna Convention on the Law of Treaties, had to be observed.

247. The Special Rapporteur further referred to a proposal, which had been made by a Member State, to include within the scope of draft article 8 contracting parties to the treaty which were not party to the armed conflict. He noted that it was an easy thing to do from a technical perspective. Nonetheless he sought the guidance of the Commission on the advisability of such suggestion.

(b) *Summary of the debate*

248. As a general point, it was recommended that the provision be drafted sufficiently flexibly to allow for the possibility that in certain cases notification would not be necessary. Several members expressed support for the proposal to include a time limit in paragraph 3; suggestions for what the limit should be varied from three to six months. Other members cautioned against the inclusion of time limits.

249. The view was expressed that the inclusion of a reference to the peaceful settlement of disputes, in paragraph 4, might not entirely take into account the reality of armed conflict. Other members found it to be a useful reminder of the fact that States are not relieved of their general obligation under Article 33 of the Charter of the United Nations. Different views were also expressed regarding paragraph 5. While several members supported its inclusion, others were of the view that it was not very clear. It was observed that if what was being referred to was the general obligation to seek the resolution of a dispute, then it was similar to paragraph 4. According to a further view, referral to specific dispute settlement procedures could be difficult to require, and States ought to be allowed a margin of appreciation in the choice of means of settlement of disputes.

250. While some members expressed support for including within the scope of draft article 8 third States not parties to the conflict but contracting parties to the treaty, others expressed doubts as it would have implications for the rest of the draft articles, and could lead to abuse.

(c) *Special Rapporteur's concluding remarks*

251. The Special Rapporteur observed that, in his view, draft article 8 was an important provision. However, the first reading version had been incomplete. He noted further the concern raised by some members that formal notification might not always be necessary or possible, but felt that that was a concern which could be taken care of through appropriate drafting.

252. As regards new paragraph 4, the Special Rapporteur was of the view that the obligation on Member States of the United Nations to resort to the peaceful settlement of disputes continued regardless of the outbreak of armed conflict. Nonetheless, he recalled that some members had opposed the inclusion of the provision, and expressed his willingness to accept the deletion of the proposed paragraph on the understanding that the point was covered by new paragraph 5.

253. He observed that new paragraph 5 received lukewarm support. Nonetheless, he remained disposed to retaining it, because it would be in keeping with the list of categories in the annex linked to draft article 5, which confirmed the likelihood of the survival of such obligations despite the outbreak of an armed conflict.

254. As for the possibility that contracting States which are not parties to the armed conflict could resort to the procedure in draft article 8, paragraph 1, his reading of the debate was that such extension of the right in question would not be desirable. At any rate,

any problems encountered by States parties not involved in the conflict could be resolved by resort to articles 60 to 62 of the Vienna Convention on the Law of Treaties.

Article 9
Obligations imposed by international law independently of a treaty[1288]

Article 10
Separability of treaty provisions[1289]

(a) *Introduction by the Special Rapporteur*

255. The Special Rapporteur observed that draft article 9, as adopted on first reading, which had its origins in article 43 of the Vienna Convention on the Law of Treaties, had not been contested.

256. He also recalled that draft article 10, which was based on article 44 of the Vienna Convention on the Law of Treaties, was crucial since it dealt with the partial termination or suspension of a treaty, which could occur often in practice. The existence of draft article 10, as already mentioned, allowed for some flexibility in the operation of draft article 5 and the list of treaty categories related thereto. In his view, there was no reason to amend the draft article.

(b) *Summary of the debate*

257. General support was expressed for draft articles 9 and 10, and for the suggestions of the Special Rapporteur.

(c) *Special Rapporteur's concluding remarks*

258. The Special Rapporteur reiterated the importance of draft article 10. Despite proposals by some States to restructure the provision, it seemed to him preferable to maintain it in a structure that followed article 44 of the Vienna Convention on the Law of Treaties.

[1288] Draft article 9 read as follows:

Obligations imposed by international law independently of a treaty

The termination of or the withdrawal from a treaty, or the suspension of its operation, as a consequence of an armed conflict, shall not impair in any way the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of that treaty.

[1289] Draft article 10 read as follows:

Separability of treaty provisions

Termination, withdrawal from or suspension of the operation of the treaty as a consequence of an armed conflict shall, unless the treaty otherwise provides or the parties otherwise agree, take effect with respect to the whole treaty except where:

(a) The treaty contains clauses that are separable from the remainder of the treaty with regard to their application;

(b) It appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(c) Continued performance of the remainder of the treaty would not be unjust.

Article 11
Loss of the right to terminate, withdraw from or suspend the operation of a treaty[1290]

Article 12
Resumption of suspended treaties[1291]

(a) *Introduction by the Special Rapporteur*

259. The Special Rapporteur observed that draft article 11, which was based on article 45 of the Vienna Convention on the Law of Treaties, contemplated the persistence of a modicum of good faith between the contracting parties, which was to be expected even in situations of armed conflict. Accordingly States which had explicitly accepted the continued applicability of a treaty, or which because of their behaviour or conduct were to be deemed to have acquiesced to the continuity of the treaty, would be deprived of the right to terminate, withdraw from or suspend the operation of the treaty.

260. The Special Rapporteur noted that a Member State had expressed the view that the rule in draft article 11 was too rigid and that the perceptions and matter of survival of treaties could change as an armed conflict unfolded, and that, accordingly, the circumstances that led to the loss of the right to put an end to a treaty could sometimes only be appreciated once the armed conflict had produced its effect on the treaty, which was not necessarily the case at the outbreak of the conflict. While agreeing that the effect on a treaty was sometimes best understood in hindsight, he nonetheless preferred to make that point in the commentary, while retaining the draft article in the text.

261. The Special Rapporteur was of the view that draft article 12 ought to be studied jointly with draft article 18. He recalled that draft article 12 dealt with the resumption of a suspended treaty, which was to be determined in accordance with the indicia referred to in draft article 4. Such agreements became operational again, not because of subsequent agreement, but because of the disappearance of the conditions which resulted in their suspension in the first place. Draft article 18, on the other hand, enabled contracting States voluntarily to implement once again or to renew the operation of the treaty through an agreement brokered after the conflict. This amounted to a novation of the treaty. He proposed to merge the two provisions into a new draft article 12 which would spell out the difference between them. In doing so, however, the content of draft article 18 would no longer be a "without prejudice" clause.

[1290] Draft article 11 read as follows:

> **Loss of the right [of the option] to terminate, withdraw from or suspend the operation of a treaty**
>
> A State may no longer terminate, withdraw from or suspend the operation of a treaty as a consequence of an armed conflict if:
>
> (a) It has expressly agreed that the treaty remains in force or continues in operation; or
>
> (b) It can by reason of its conduct be considered as having acquiesced in the continued operation of the treaty or in its maintenance in force.

[1291] Draft article 12 read as follows:

> **Revival or resumption of treaty relations subsequent to an armed conflict**
>
> 1. Subsequent to an armed conflict, the States parties may regulate, on the basis of agreement, the revival of treaties terminated or suspended as a result of the armed conflict.
>
> 2. The resumption of the operation of a treaty suspended as a consequence of an armed conflict shall be determined in accordance with the indicia referred to in draft article 4.

(b) Summary of the debate

262. While support was expressed for the Special Rapporteur's recommendations regarding draft article 11, several members expressed doubts as to the reference to an "option" to terminate, withdraw from or suspend the operation of the treaty. According to another suggestion, the two subparagraphs could be merged. The concern was further expressed that the provision was too strict; and it was recommended that it could include a *mutatis mutandis* cross-reference to article 62 of the Vienna Convention on the Law of Treaties, relating to fundamental change of circumstances.

263. General support was expressed for the Special Rapporteur's proposal to merge draft article 12 with draft article 18, subject to a refinement of the proposed formulation of the provision and its title.

(c) Special Rapporteur's concluding remarks

264. The Special Rapporteur recalled the concern, raised by a State, that it might be difficult to determine the effect on the treaty at the moment of the outbreak of the armed conflict, and proposed that the commentary make clear that draft article 11 would be applicable to the extent that the effects of the conflict could be gauged in a definitive manner at the time the conflict took place. That would mean that draft article 11 would not be applied in situations where the length and duration of the conflict had altered the latter's effects on the treaty, which could not have been anticipated by the State upon giving its acquiescence to the continued application of the treaty.

Article 13
Effect of the exercise of the right of individual or collective self-defence[1292]

(a) Introduction by the Special Rapporteur

265. The Special Rapporteur recalled that draft article 13 had been inspired by article 7 of the 1985 resolution of the International Law Institute. It sought to prevent the situation where compliance with a treaty deprived a State of its right to self-defence. It anticipated the possibility of suspension but not termination, and only applied in an inter-State context. The text adopted by the Institute of International Law had included a further clause anticipating the possibility that the Security Council could subsequently determine that, in fact, the possible victim State was, in reality, the aggressor, and reserved the consequences of such a finding. It was recalled that the Commission specifically considered this point during the first reading and decided to not include such an additional proviso. He concurred with that decision, and proposed that it be maintained during the second reading.

266. It was also recalled that a Member State had observed that the possibility of a State suspending treaties in a situation of the exercise of self-defence had to be subject to draft article 5. The Special Rapporteur was inclined to accept such clarification, although he preferred to refer to the content of both draft articles 4 and 5. He further recalled the suggestion, also by a Member State, that it be clarified in the commentary that the possibility of suspension of treaties by a State in a situation of self-defence could not

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[1292] Draft article 13 read as follows:

> **Effect of the exercise of the right to individual or collective self-defence on a treaty**
>
> Subject to the provisions of article 5, a State exercising its right of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty to which it is a party and which is incompatible with the exercise of that right.

include conventional rules designed to be applied in the context of international armed conflicts, such as the 1949 Geneva Conventions and Additional Protocol I of 1977.

(b) Summary of the debate

267. Several members expressed support for the Special Rapporteur's view that draft article 13, as adopted on first reading, should be retained. Other members referred to the difficulty of determining, in practice, which side in an armed conflict was legitimately acting in self-defence. It was proposed to replace the draft article by a "without prejudice" clause, or a more general clause such as that in article 59 of the 2001 articles on the Responsibility of States for Internationally Wrongful Acts. It was also noted that Article 51 of the Charter of the United Nations was itself a saving clause and did not set out all the conditions for the exercise of self-defence, such as the requirements of proportionality and necessity. It was further stated, in support of a without prejudice clause, that the content of article 51 was less clear in light of recent developments in the law on the use of force. At the same time, it was recalled that the main purpose of the exercise was not to provide the State acting in self-defence with all the tools to do so, but rather, as per draft article 3, to preserve the stability of treaty relations in times of armed conflict.

268. Another suggestion was that the title had to be amended since it could be read as suggesting an automatic effect of the exercise of self-defence. A preference was expressed for keeping the formulation as close as possible to that in Article 51 of the Charter of the United Nations, including the phrase "individual or collective" in the title. Support was further expressed for indicating that the exercise of the right to self-defence should be "in accordance with the provisions of the Charter of the United Nations". According to another view, such a formulation was to be avoided since it left little room for customary international law rules on the exercise of self-defence. The view was also expressed that the opening phrase "[s]ubject to the provisions of article 5" was problematic, since it suggested that draft article 5 had priority over draft article 13, and by implication changed the nature of draft article 5 to a more emphatic statement that the treaties referred therein would continue regardless of the situation. It was thus suggested that the phrase either be deleted or replaced by "notwithstanding draft article 5". Others preferred to keep the cross-reference to draft article 5 as proposed by the Special Rapporteur. It was pointed out that there were certain treaty rules, such as those of international humanitarian law and those establishing boundaries, which could not be terminated or suspended through the invocation of the right to self-defence. It was also suggested to clarify that a State acting in self-defence did not have the right to terminate or suspend a treaty as a whole, when only the termination or suspension of some provisions was necessary for the exercise of self-defence. Agreement was also expressed with the Special Rapporteur's preference for not including a reference to the subsequent determination by the Security Council.

(c) Special Rapporteur's concluding remarks

269. The Special Rapporteur remarked that difficulties in identifying the State exercising the right of self-defence in accordance with the requirements under international law did not justify the deletion of the draft article. It was a useful reminder that there were situations where the right to self-defence should hold sway over treaty obligations, but only to the extent that the treaty obligations in question restricted the exercise of such right to self-defence.

270. As regards the suggestion to subordinate the right to suspend treaty obligations to the conditions mentioned in draft articles 4 and 5, the Special Rapporteur acknowledged the difficulties caused thereby and withdrew his proposal. He also expressed a preference for the current wording "in accordance with the Charter" since it covered both self-defence provided for in the Charter of the United Nations, as well as that under customary

international law. He reaffirmed his view that it was not necessary to reproduce the words "individual or collective" in the title as these words were already contained in draft article 13.

Article 15
Prohibition of benefit to an aggressor State[1293]

(a) *Introduction by the Special Rapporteur*

271. The Special Rapporteur observed that draft article 15 had also been inspired by a similar provision in the 1985 resolution adopted by the Institute of International Law. It reflected the policy position that an aggressor State should not be able to relieve itself of its treaty commitments as a consequence of a conflict that it had initiated. The draft article was limited to inter-State armed conflicts. The qualification of a State as an aggressor depended on the way in which that notion was defined and, from a procedural point of view, on the Security Council. The draft article prohibited a State claiming the right to terminate, suspend or withdraw from treaties from doing so if it was qualified as an aggressor by the Security Council, and where such termination, suspension or withdrawal would be to the aggressor State's benefit, and this could be ascertained by the Security Council itself, or *ex post* by an arbitration court or international judge. He noted that while a number of Member States had approved draft article 15, there had been disagreement on the inclusion of a reference to General Assembly resolution 3314 (XXIX) of 14 December 1974.

272. It was further recalled that a Member State had expressed the concern that, according to the version adopted on first reading, once a State had been designated as an aggressor in the context of a particular conflict, it might continue to carry this stigma in subsequent conflicts. The Special Rapporteur proposed making it clearer that the armed conflict referred to in draft article 15 resulted from the aggression referred to at the beginning of the article, by adding the words "that results from". The Special Rapporteur also drew the Commission's attention to a proposal that the scope of draft article 15 be extended beyond acts of aggression to any resort to force, or threat thereof, in violation of article 2, paragraph 4, of the Charter of the United Nations. His preference was to limit draft article 15 to the consequences of aggression committed by States.

(b) *Summary of the debate*

273. Some members expressed concern regarding the difficulty in determining the existence of an act of aggression. It was asserted that the international community had not agreed on a sufficiently clear definition of aggression and that General Assembly resolution 3314 (XXIX) remained controversial. As such, it was proposed that draft article 15 be replaced by a "without prejudice" clause, or that its subject matter be covered by an appropriately expanded draft article 14. Other members preferred to retain the draft article in the affirmative drafting proposed by the Special Rapporteur. While not denying the complexity of determining the existence of an act of aggression, they nonetheless expressed

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[1293] Draft article 15 read as follows:

Prohibition of benefit to an aggressor State [a State that uses force unlawfully]

A State committing aggression within the meaning of the Charter of the United Nations and resolution 3314 (XXIX) of the General Assembly of the United Nations [A State using force in violation of Article 2, paragraph 4, of the Charter of the United Nations] shall not terminate, withdraw from or suspend the operation of a treaty as a consequence of an armed conflict that results from the act of aggression [from the unlawful use of force] if the effect would be to the benefit of that State.

support for the inclusion of a reference to resolution 3314 (XXIX), which had been supported by both case law and doctrine as a reflection of customary international law of at least a core set of possible manifestations of aggression. Different views were expressed regarding the relevance of the adoption of article 8 *bis* of the Rome Statute of the International Criminal Court, at the 2010 Review Conference to the Rome Statute held at Kampala (Uganda). According to one set of views, since the Rome Statute was concerned with the criminal responsibility of individuals, its provisions on aggression were irrelevant to the effects of armed conflicts on treaties. Others noted that resolution 3314 (XXIX) had provided the basis for the definition of aggression adopted at the Review Conference, which was proof of its universal acceptance and relevance. It was further proposed that if the reference to resolution 3314 (XXIX) were retained, the formulation of draft article 15 would have to avoid the impression that that resolution operated on the same level as the Charter of the United Nations.

274. A difference of opinion also arose over the proposal to expand the scope of draft article 15 to cover any resort to armed force in contravention of the prohibition in article 2, paragraph 4, of the Charter of the United Nations. Some members expressed support as that would, *inter alia*, avoid the divisive issue of aggression. It was recalled that the Security Council had been reluctant to determine the existence of acts of aggression even in cases of egregious breaches of the peace. A broader formulation would also more accurately serve as counterpart to draft article 13 since the right to self-defence was not limited to responses to acts of aggression. Other members expressed concern regarding the possible expansion of the scope of the provision since it would deprive the draft article of the specificity that the reference to a State committing aggression provided, making it easier for the provision to be asserted in practice and thereby increasing the possibility of abuse. Some members noted that the interpretation of Article 2, paragraph 4, of the Charter was also controversial and that this provision was not an exact counterpart to Article 51 of the Charter regarding the right to self-defence.

275. Doubts were also expressed as to the concluding qualifier that the effect of the act of aggression would have to be to "the benefit of" the aggressor State, which seemed difficult to establish conclusively in practice. It was suggested that the commentary make it clear that the "benefit" arising from the aggression should not be limited to military or strategic advantage.

(c) *Special Rapporteur's concluding remarks*

276. The Special Rapporteur recalled that the purpose of draft article 15 was to prevent an aggressor State from benefiting from a conflict it had triggered in order to put an end to its own treaty obligations. This led to a discussion on the definition of an act of aggression, and, in particular, on the merits of General Assembly resolution 3314 (XXIX). The Special Rapporteur reiterated his preference for retaining a reference to that resolution, in a formula that would also refer to the Charter of the United Nations, even if the two were to be placed on different levels. He furthermore opposed deleting the reference to the aggressor benefiting from the act of aggression. He also noted that the possibility of extending the scope of the provision to the violation of the prohibition on the use of force would mean that States could more easily rid themselves of their treaty obligations.

Article 14
Decisions of the Security Council

Article 16
Rights and duties arising from the laws of neutrality

Article 17
Other cases of termination, withdrawal or suspension[1294]

(a) *Introduction by the Special Rapporteur*

277. The Special Rapporteur observed that draft articles 14, 16 and 17 dealt with the issues not affected by the draft articles. Draft article 14 reserved the decisions taken by the Security Council under Chapter VII of the Charter of the United Nations. While some Member States had been of the view that draft article 14 was superfluous, in light of article 103 of the Charter of the United Nations, he nonetheless preferred to retain it in the draft article for the sake of clarity.

278. Draft article 16 preserved the rights and duties arising from the laws of neutrality. The Special Rapporteur recalled the suggestion that treaties establishing neutrality appear as an item in the Annex related to draft article 5, instead of appearing as a "without prejudice" clause. He pointed out that neutrality was not always established by treaty and that since the status of neutrality was typically relevant during periods of armed conflict (except "permanent" neutrality which also had effect in time of peace), a reference in the Annex related to draft article 5 was not useful.

279. Draft article 17 reserved the right of States to terminate, withdraw from or suspend the operation of treaties on other grounds recognized by international law, particularly those provided for by the 1969 Vienna Convention. The list of alternative grounds was not intended to be exhaustive. Acting on the suggestion of a Member State, the Special Rapporteur proposed an alternative, more general, formulation, although he preferred to retain the approach adopted on first reading of specifying examples of such "other grounds", including as suggested by a Member State, "the provisions of the treaty" as an additional ground.

(b) *Summary of the debate*

280. General support was expressed for draft article 14.

[1294] Draft article 14 read as follows:

Decisions of the Security Council

The present draft articles are without prejudice to the legal effects of decisions of the Security Council in accordance with the provisions of Chapter VII of the Charter of the United Nations.

Draft article 16 read as follows:

Rights and duties arising from the laws of neutrality

The present draft articles are without prejudice to the rights and duties of States arising from the laws of neutrality.

Draft article 17 read as follows:

Other cases of termination, withdrawal or suspension

The present draft articles are without prejudice to the termination, withdrawal or suspension of treaties as a consequence of, *inter alia*: (a) the provisions of the treaty; (b) the agreement of the parties; (c) a material breach; (d) supervening impossibility of performance; (e) a fundamental change of circumstances.

[Or a general and abstract formulation:]

The present draft articles are without prejudice to termination, withdrawal or suspension of operation on other grounds recognized under international law.

281. As regards draft article 16, the view was expressed that it should be deleted since the law of neutrality had been overtaken, to a large extent, by the Charter of the United Nations, which required compliance by States Members. Other members expressed support for retaining the provision. It was noted that the institution was still relevant despite the universal adherence to the Charter of the United Nations.

282. Regarding draft article 17, some support was expressed for the more general formulation, but most members found the reference to specific grounds to be more useful. Support was also expressed for the inclusion of a new subparagraph referring to the "provisions of the treaty", which would be consistent with article 57, paragraph (a), of the 1969 Vienna Convention. It was further observed that the other grounds identified in the provision had to be considered in light of the draft articles when being applied to cases falling within the scope of the draft articles.

(c) Special Rapporteur's concluding remarks

283. The Special Rapporteur was of the view that draft article 14, which had enjoyed general support, could be located after draft article 15. He preferred to retain draft article 16, since he was not convinced that the Charter of the United Nations negated the concept of neutrality. As regards draft article 17, he observed that only some support had been expressed in the Commission in favour of a general formulation, and recommended that the text proposed by him be retained.

3. Other issues

(a) Introduction by the Special Rapporteur

284. The Special Rapporteur recalled that there had been a proposal to include an additional provision preserving the rules of international humanitarian law and international human rights law. Although not opposed to the idea in principle, he was of the view that the "without prejudice" clauses should be limited to what was strictly necessary in the context of the draft articles, and that such a provision was not *a priori* necessary. He noted a suggestion to include in the Annex related to draft article 5 references to the category of transport-related treaties, specifically those concerning air transport. His preference was not to do so, given the specificities of such agreements. He also recalled the view expressed by Member States that the consequences of termination, withdrawal from, or suspension of the operation of a treaty were not mentioned in the text. He was of the view that reference should be made to articles 70 and 72 of the 1969 Vienna Convention, which could be done in the commentary to draft article 8.

285. He further noted that there had been a suggestion in the Sixth Committee to clarify in the draft articles that States involved in non-international armed conflict could only demand suspension of a treaty — not termination — taking into account draft articles 4 and 5 as well as the categories in the Annex. The hypothesis that had been put forward was that the purported difference in nature and scale between international and non-international armed conflicts required a differentiation in the applicable rules. The Special Rapporteur, while expressing doubts as to such categorical analysis, sought the views of the Commission on the proposal. He also reminded the Commission that thought ought to be given to the eventual form of the draft articles.

(b) Summary of the debate

286. General agreement was expressed with the Special Rapporteur's view that there was no need to include another saving clause covering the duty to respect international humanitarian law and human rights law.

287. The preponderant view in the Commission was that there should not be an express distinction in the draft articles between the effects of international and non-international armed conflicts. It was noted that the effects of an armed conflict could depend as much on its scale and duration as on whether it was international or non-international in character. Nor was there strong support for the suggestion that the effects of non-international armed conflicts be limited to suspension of the operation of treaties. Other members were prepared to consider such a provision, so as to accommodate the fact that a State engaged in an internal conflict might face a unique situation where it is temporarily unable to meet the obligations of a treaty. It was suggested that the commentary clarify that the inclusion of non-international armed conflicts, and the widening of the concept of armed conflict, was not meant to expand the possibilities for States to terminate or suspend treaty relationships in the context of traditional non-international armed conflicts where a government was alone facing an insurrection on its own territory. Instead, for non-international armed conflicts to have an effect on treaties, an additional outside involvement would be required.

288. As to the possible form of the draft articles, a member expressed support for their eventual adoption as a treaty, in light of their importance to the requirement of legal security, while another was of the view that it was still too premature to consider the issue.

(c) Special Rapporteur's concluding remarks

289. The Special Rapporteur confirmed that non-international conflicts were covered by the draft articles. The issue, however, was whether there were different effects according to whether the conflicts were international or non-international in nature. He noted that there was no strong support in the Commission for such a distinction. The effects of an armed conflict would have to be gauged by taking into account the concrete circumstances of each case.

Chapter VII
Protection of persons in the event of disasters

A. Introduction

290. The Commission, at its fifty-ninth session (2007), decided to include the topic "Protection of persons in the event of disasters" in its programme of work and appointed Mr. Eduardo Valencia-Ospina as Special Rapporteur. At the same session, the Commission requested the Secretariat to prepare a background study, initially limited to natural disasters, on the topic.

291. At the sixtieth session (2008), the Commission had before it the preliminary report of the Special Rapporteur (A/CN.4/598), tracing the evolution of the protection of persons in the event of disasters, identifying the sources of the law on the topic, as well as previous efforts towards codification and development of the law in the area. It also presented in broad outline the various aspects of the general scope with a view to identifying the main legal questions to be covered and advancing tentative conclusions without prejudice to the outcome of the discussion that the report aimed to trigger in the Commission. The Commission also had before it a memorandum by the Secretariat, focusing primarily on natural disasters (A/CN.4/590 and Add.1 to 3) and providing an overview of existing legal instruments and texts applicable to a variety of aspects of disaster prevention and relief assistance, as well as of the protection of persons in the event of disasters.

292. The Commission considered, at its sixty-first session in 2009, the second report of the Special Rapporteur (A/CN.4/615 and Corr.1) analysing the scope of the topic *ratione materiae*, *ratione personae* and *ratione temporis*, and issues relating to the definition of "disaster" for purposes of the topic, as well as undertaking a consideration of the basic duty to cooperate. The report contained proposals for draft articles 1 (Scope), 2 (Definition of disaster) and 3 (Duty to cooperate). The Commission also had before it written replies submitted by the Office for the Coordination of Humanitarian Affairs of the United Nations Secretariat and the International Federation of the Red Cross and Red Crescent Societies to the questions addressed to them by the Commission in 2008.

293. At its 3019th meeting, on 10 July 2009, the Commission referred draft articles 1 to 3 to the Drafting Committee, on the understanding that if no agreement was possible on draft article 3, it could be referred back to the Plenary with a view to establishing a working group to discuss the draft article. At its 3029th meeting, on 31 July 2009, the Commission received the report of the Drafting Committee and took note of draft articles 1 to 5, as provisionally adopted by the Drafting Committee (A/CN.4/L.758).

B. Consideration of the topic at the present session

294. At the present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/629) providing an overview of the views of States on the work undertaken by the Commission thus far, a consideration of the principles that inspire the protection of persons in the event of disasters, in its aspect related to persons in need of protection, and a consideration of the question of the responsibility of the affected State. Proposals for the following three further draft articles were made in the report: draft articles 6 (Humanitarian principles in disaster response), 7 (Human dignity) and 8 (Primary responsibility of the affected State).

295. The Commission considered the third report at its 3054th to 3057th meetings, from 1 to 4 June 2010.

296. At its 3057th meeting, on 4 June 2010, the Commission referred draft articles 6 to 8 to the Drafting Committee.

297. At its 3067th meeting, on 20 July 2010, the Commission received the report of the Drafting Committee and took note of draft articles 6 to 9, as provisionally adopted by the Drafting Committee (A/CN.4/L.776).[1295]

298. The Commission adopted the report of the Drafting Committee on draft articles 1 to 5, which had been considered at the Commission's previous session, at the 3057th meeting, held on 4 June 2010 (sect. C.1 below).

299. At its 3072nd meeting, on 2 August 2010, the Commission adopted commentaries to draft articles 1 to 5 (sect. C.2 below).

1. Introduction by the Special Rapporteur of the third report

300. The Special Rapporteur explained that his third report followed from the debate held on his second report. In particular, he recalled that it had been recommended that he focus on two issues: the principles — in addition to that of consent — directly relevant to the protection of persons, including the humanitarian principles of humanity, neutrality and impartiality, and the question of the primary responsibility of the affected State for protecting persons under its territorial jurisdiction, which also raised issues concerning the fundamental principles of sovereignty and non-intervention. Both sets of issues were the subject matter of his third report.

301. As regards draft article 6, the Special Rapporteur recalled that the Secretariat had pointed out in its memorandum that the three principles of neutrality, impartiality and humanity were "core principles regularly recognized as foundational to humanitarian assistance efforts generally".[1296] This was further substantiated by recent discussions within

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[1295] The draft articles provisionally adopted by the Drafting Committee read as follows:

Article 6
Humanitarian principles in disaster response

Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable.

Article 7
Human dignity

In responding to disasters, States, competent intergovernmental organizations and relevant non-governmental organizations shall respect and protect the inherent dignity of the human person.

Article 8
Human rights

Persons affected by disasters are entitled to respect for their human rights.

Article 9
Role of the affected State

1. The affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory.

2. The affected State has the primary role in the direction, control, coordination and supervision of such relief and assistance.

[1296] Document A/CN.4/590, at para. 11.

the United Nations on the basic principles of humanitarian assistance, as well as by recent reports of the Secretary-General. He further recalled that the principles were routinely cited in General Assembly resolutions and a number of instruments dealing with humanitarian response, including those adopted under the auspices of the Red Cross Movement.

302. The principle of neutrality referred to the apolitical nature of action taken in disaster response. It implied that the actors involved should refrain from committing acts which might constitute interference in the internal affairs of the domestic State, so as to ensure an adequate and effective response as required by draft article 2. It also ensured that the interests of the persons affected by a disaster continued to be the central concern of relief efforts.

303. The principle of impartiality concerned the qualitative purpose of disaster response, as elaborated in draft article 2, namely to meet the essential needs of the persons affected by a disaster, and to ensure full respect for their rights. It included three components: non-discrimination, proportionality and impartiality *per se*. Non-discrimination, which was initially developed in the context of international humanitarian law, had also become a fundamental provision in human rights law, and was reflected in Article 1, paragraph 3, of the Charter of the United Nations. Under the principle of proportionality, the response to a disaster should be in proportion to the degree of suffering and urgency. It took into account the possibility that time and resources may not be readily available, and a degree of flexibility and prioritization was necessary. As for the aspect of impartiality proper, this referred to the obligation not to draw a substantive distinction between individuals based on criteria other than need.

304. The Special Rapporteur noted that the principle of humanity was a long-standing principle of international law. In its contemporary meaning it was the cornerstone for the protection of persons in international law and it served as a meeting point between international humanitarian law and international human rights law. Accordingly, it provided the necessary inspiration for instruments on the protection of persons in the event of disasters, and was an expression of general values which provided guidance to the international system as a whole both in times of war and in times of peace. He chose to include the principle in the draft articles since it was equally applicable in times of crisis arising out of the onset of a disaster.

305. Concerning draft article 7, on human dignity, the Special Rapporteur recalled that the Commission had already had the opportunity to debate the concept in the context of its consideration of the topic of the expulsion of aliens. There seemed to be agreement that it was not a human right *per se*, but rather was posited as a fundamental principle that gave rise to all human rights. Although closely related to the principle of humanity in draft article 6, it was nonetheless distinguishable. It was recalled that human dignity was incorporated as a central element of the 1948 Universal Declaration of Human Rights, as well as in numerous human rights treaties adopted at universal and regional levels. It was also an essential pillar in the protection of human rights in domestic legal systems. By including the principle of human dignity, together with the humanitarian principles elaborated in draft article 6, the Special Rapporteur sought to provide a complete framework guaranteeing respect for the protection of human rights of persons affected by disasters, making it unnecessary to elaborate a list of specific rights.

306. Draft article 8 arose out of an understanding reached in the Drafting Committee in 2009, upon the adoption of draft article 5, that a provision on the primary responsibility of the affected State would be formulated. It reflected the principles of sovereignty and non-intervention, both of which were universally accepted as underpinning the edifice of international law. The principle of sovereignty, which was based on the fundamental concept of sovereign equality, and which was well established in international law, implied that each State was free and independent, and therefore could exercise its functions on its

own territory to the exclusion of others. Closely related was the principle of non-intervention in the domestic affairs of other States, also well established in international law, which served to guarantee the maintenance of sovereign equality between States.

307. In his view, there was no doubt that an affected State had the faculty to adopt legitimate measures to guarantee protection of persons on their territory. As a consequence of this, other entities, whether international organizations or States, could not interfere in a unilateral way in the process of response. Instead, they were required to act in accordance with draft article 5 on the duty to cooperate. This did not mean that such sovereign authority should be absolute. The Special Rapporteur recalled that there existed minimum international norms, including human rights protections, which had to be respected. As such, the principles of sovereignty and non-intervention were a point of departure and not a point of conclusion, and implied both rights and obligations. He further confirmed his intention to clarify, in his next report, the scope and the limitations of the exercise by the affected State of its primary responsibility. It was further pointed out that it was well established in international law that the Government of the affected State was in the best position to assess the seriousness of an emergency situation and to implement response policies. The consequence of this was that the affected State had the primary responsibility to ensure the protection of persons in the event of disasters by facilitating, coordinating and supervising relief activities on its territory.

308. Furthermore, many international instruments had recognized either expressly or implicitly that international relief operations could only be undertaken on the basis of the consent of the affected State. Whereas the responsibility to coordinate and facilitate assistance was an internal aspect of the primary responsibility of the affected State, the requirement of obtaining that State's consent was an external matter since it governed the relations with other States and bodies. The requirement of consent was a consequence of the principles of sovereignty and non-intervention, and applied throughout the period of relief activities provided by external actors.

2. Summary of the debate

(a) *Draft article 6 (Humanitarian principles in disaster response)*[1297]

309. Support was expressed for the reference to the humanitarian principles applicable to disaster response. They were characterized as important safeguards for the relationship between relevant actors, while also guaranteeing that the needs of affected persons were given priority. The view was further expressed that the three principles were well established in international law, as reflected in a number of international instruments. At the same time, it was noted that there existed possible divergences, and conflicts, political, ideological, religious or cultural, among States, which could impede efforts to deliver timely and effective assistance. According to a further view, it was not advisable to depart from the principles without good reason since they were well established. According to a contrary view, while they were important principles for the International Red Cross Movement, it was not clear that they were principles of international law.

310. The view was expressed that the principle of humanity was the cornerstone for the protection of persons in international law since it placed the affected person at the centre of the relief process and recognized the importance of his or her rights and needs. It also

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[1297] Draft article 6 read as follows:

Humanitarian principles in disaster response

Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality.

served as an important litmus test for the actions of those providing humanitarian assistance. According to another view, references to the "principle of humanity" were mostly found in non-binding instruments, and were largely context specific.

311. Support was also expressed for the inclusion of the principle of neutrality which obliged assisting actors to do everything feasible to ensure that their activities were not undertaken for purposes other than responding to the disaster in accordance with humanitarian principles. It was observed that the principle of neutrality was a consequence of the obligation to respect the sovereignty of States. Several members, however, expressed doubts as to the incorporation of the principle of neutrality which was traditionally asserted in the context of armed conflict. The view was also expressed that the concern about interference in the domestic affairs of the State was best covered by the principle of impartiality. Another suggestion was to replace the reference to the principle of neutrality with that of the principle of non-discrimination.

312. The view was expressed that the principle of impartiality was well established. It was also noted that directing assistance to vulnerable groups would not *per se* violate the component of non-discrimination within the broader principle of impartiality. Doubts were, however, expressed concerning the requirement of proportionality. It was stated that the linkage to the needs of the affected persons was not the only issue of relevance. Other factors, such as economic considerations relating to the capability to provide assistance, were also relevant. In other words, it was not always possible to require that the assistance offered had to be proportional to the needs. It was thus important that proportionality be assessed on a case-by-case basis, taking into account the reality on the ground. On the impartiality *per se* aspect, the view was expressed that it should be made more explicit in the provision, by including a reference to the obligation not to draw a subjective distinction according to the persons affected.

313. It was further noted that the principle of humanity did not give rise to specific obligations, which was different from the principles of neutrality (non-intervention) and impartiality (non-discrimination). Therefore, it was proposed to distinguish between the principle of humanity and the other two principles, by either replacing the phrase "shall take place in accordance with" by "is guided by" or "is based upon"; or by reflecting the principles in the preamble and providing separate articles on the content of those principles, namely non-intervention and non-discrimination. Other suggestions included adding a reference to the principle of independence and reflecting the humanitarian principles in the preamble. The latter suggestion was opposed by a member who was of the view that including them in the operative part served to emphasize the point that the manner in which humanitarian response is managed is not only a policy consideration, but also a legal obligation.

(b) Draft article 7 (Human dignity)[1298]

314. Support was expressed for the Special Rapporteur's proposal for draft article 7. It was recognized that human dignity was a source of human rights and not a right *per se* entailing obligations. It was recalled that the issue had been discussed in the context of the topic "expulsion of aliens" and that there was agreement in the Commission not to dwell on establishing human dignity as a right, since its focus was on the treatment of the individual which ought to respect human dignity. Some members were of the view that it was not

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[1298] Draft article 7 read as follows:

Human dignity

For the purposes of the present draft articles, States, competent international organizations and other relevant actors shall respect and protect human dignity.

entirely clear that the concept could be easily transposed to the situation of a disaster, which was different from the context of expulsion of aliens, where it applied to questions of process. Nor was it clear what its relationship was with draft articles 6 and 8. The doubt was expressed that the provision seemed to imply that every life should be rescued and every victim assisted, which had implications for the capacity of the affected State and the duty of other States to give assistance. A preference was thus expressed for viewing the concept in terms of a desired conduct as opposed to imposing an obligation of result.

315. It was also suggested that the recognition of human dignity could be supplemented by the obligation to respect human rights as set out in existing international instruments, so as to reinforce the applicability of rights, while also giving recognition to the fact that in such emergencies, the affected State was authorized provisionally to suspend (derogate from) certain human rights to the extent permitted by international law. It was also proposed that the reference to "relevant actors shall respect and protect Human Dignity" be clarified in terms of its relationship with existing international human rights law. According to another view, draft article 7 could be amalgamated with draft article 6.

(c) *Draft article 8 (Primary responsibility of the affected State)*[1299]

316. Several members proposed to restate the principles of sovereignty and non-intervention in the domestic affairs of a State, which constituted the primary principles on the basis of which the regime for protection of persons in the event of disasters was to be developed. It was said that such approach would properly reflect both the rights of the affected State *vis-à-vis* humanitarian assistance, as well as its responsibility for the overall rescue operations. Another view was that the implicit reference to the principles of sovereignty and non-intervention in draft article 8, paragraph 2, requiring the consent of the affected States, was inadequate. According to a different view, the approach taken in the Special Rapporteur's report leant too much in favour of the traditional view of international law as being based on sovereignty and the consent of States, and did not adequately take into account the contemporary understanding of State sovereignty. It was considered important to balance State sovereignty with the need to protect human rights, and it was recalled that the purpose of the topic was the protection of persons in the event of disasters, and not the protection of the rights of States.

317. Several members spoke in favour of draft article 8, and of the position that under international law the primary responsibility remained with the affected State. This was considered to be an important clarification since it protected against unwarranted interference in the domestic affairs of the affected State. Accordingly, the affected State had the duty to protect individuals on its territory in accordance with the draft articles, while retaining the right to refuse assistance from abroad.

318. Several members were of the view that it had to be clarified that primary responsibility did not mean exclusive responsibility. While the affected State would be allowed a margin of appreciation, in the final analysis it bore the responsibility for its refusal to accept assistance, which could lead to the existence of an internationally wrongful act if such refusal undermined the rights of the affected individual under international law. The affected State remained subject to the duty to cooperate under draft

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[1299] Draft article 8 read as follows:

Primary responsibility of the affected State

1. The affected State has the primary responsibility for the protection of persons and provision of humanitarian assistance on its territory. The State retains the right, under its national law, to direct, control, coordinate, and supervise such assistance within its territory.

2. External assistance may be provided only with the consent of the affected State.

article 5. It was suggested that a reference to the secondary responsibility of the international community be added to the provision, or that paragraph 2 could be replaced with the following clause: "article 8, paragraph 1, is without prejudice to the right of the international community as a whole to provide lawful humanitarian assistance to persons affected by a disaster if the affected State lacks the capacity or will to exercise its primary responsibility to provide humanitarian assistance". According to a further view, the international community did not, under contemporary international law, enjoy a "secondary" responsibility for the protection of victims of disasters. Accordingly, the reference to the "primary" responsibility should be deleted as it implied the existence of "secondary" duties, which could lead to unwarranted intervention. It was recalled that the Commission had excluded the applicability of the concept of "responsibility to protect" from the scope of the application of the draft articles in 2009.

319. Other members expressed the view that, while emphasising the duty of cooperation, the draft articles should recognize the sovereignty of the affected State, its responsibility towards its own nationals, its right to decide whether it requires international assistance, as it was in the best position to assess the needs of the situation, as well as its own capacity to respond, and if it accepted international assistance, the right to direct, coordinate and control such assistance within its territory. It was recalled that the notion of primary responsibility of the affected State was recognized in various General Assembly resolutions and in global and regional instruments and in various international codes of conduct and guidelines for disaster relief. As such, all offers of humanitarian assistance as response to disasters would have to respect sovereignty, independence and territorial integrity of the affected State.

320. It was suggested that the term "affected" State be defined, particularly in the context of situations of occupation or international administration. It was also recommended that it be clarified that the reference to "responsibility" was meant in the sense of "competence" and not that which arises from the commission of an internationally wrongful act. In terms of a further suggestion, the reference to "responsibility" could be replaced by "duty", which would accord with the affected State having an obligation under international law to protect persons on its territory. It was noted that such a formulation was closer to that proposed by the Institute of International Law in its resolution of 1986.

321. Another suggestion was that paragraph 1 could be replaced with the text of operative paragraph 4 of the annex to General Assembly resolution 46/182 of 19 December 1991: "[e]ach State has the responsibility first and foremost to take care of the victims of natural disasters and other emergencies occurring on its territory. Hence, the affected State has the primary role in the initiation, organization, coordination, and implementation of humanitarian assistance within its territory".

322. Support was expressed for the requirement of consent established in paragraph 2, which was considered by some to be the central provision of the draft articles. Reference was made to General Assembly resolution 46/182 which referred to the requirement that humanitarian assistance be provided with the consent of the affected State and, in principle, on the basis of an appeal by that State. It was noted that the requirement of consent of the affected State followed from elementary considerations of sovereignty. To enter a foreign State to provide assistance against the will of that State would be a form of intervention contrary to the Charter of the United Nations. It was suggested that it be made clear that the draft articles do not permit a right of intervention in cases of disaster.

323. Other members expressed doubts as to the inclusion of the word "only". The view was expressed that prior express consent was not always required, since there could be exceptional circumstances where the affected State would be unable to give formal consent within a timescale needed to react to an overwhelming disaster. It was also suggested that consideration be given to recognizing the legal consequences of the responsibility of the

affected State by stating that its consent "shall not unreasonably be withheld", without prejudice to its sovereign right to decide whether or not external assistance was appropriate. The affected State would thus be placed under an obligation not to reject a *bona fide* offer exclusively intended to provide humanitarian assistance. Reference was made to the memorandum of the Secretariat which detailed some of the nuances surrounding consent. It was also suggested that incentives be established for the affected State to give its consent whenever international cooperation was likely to enhance the protection of the victims of disasters. According to another view, the focus should be less on consent and more on adequate coordination of relief assistance. Others spoke out against reformulating draft article 8 so as to suggest that the affected State could be penalized for "unreasonably withholding consent" as that would be contrary to existing law.

324. Other suggestions included clarifying that consent should be explicit, and specifying whether the reference to "external" assistance imposed an international law requirement that the actions of non-governmental organizations, or other private bodies, should also be based on the consent of the affected State, or whether it was sufficient that such entities comply with the internal law of the affected State. It was also suggested that the two paragraphs in draft article 8 be reflected in separate draft articles.

3. Special Rapporteur's concluding remarks

325. As regards draft article 6, the Special Rapporteur recalled some of the concerns that were expressed during the debate regarding the reference to the principles of humanity, neutrality, impartiality and proportionality, which had been employed in specific areas of law, including in international humanitarian law and on the non-use of force in the Charter of the United Nations. It had been maintained that their transposition to the context of protection of persons in events of disasters was not easy nor necessarily feasible. In his view, the applicability of a principle, which by definition was conceived in general and abstract terms, could extend to other areas of law, different from that in which the concept originated and with which it was traditionally associated.

326. The Special Rapporteur stated that he also did not believe it necessary or useful to draw up specific definitions of the principles because they were universally recognized by international law. This was as valid with regard to the humanitarian principles as it was for the principles of sovereignty and non-intervention. The fact that behaviour should be in accordance with certain principles was a sufficient standard to be guided by. He nonetheless confirmed that the specificity that some members sought would be provided in the corresponding commentaries.

327. He noted further that there had been divergent opinions about whether to keep or exclude the reference to the principle of neutrality. He preferred to retain it for the reasons put forward in the third report. He noted also the proposal to include the principle of non-discrimination, whose modern origins were found in international humanitarian law, particularly in the first Geneva Convention of 1864. However, he reiterated his view that the fact that a specific principle such as non-discrimination was historically closely linked to international humanitarian law did not mean that that same principle could not be applicable to the protection of persons in the event of disaster. Accordingly, he could accept the principle of non-discrimination being added to the three principles contained in draft article 6.

328. With respect to draft article 7, the Special Rapporteur recalled that the Drafting Committee had recently proposed the inclusion of a similar draft article on human dignity in the context of the expulsion of aliens (not as a preambular clause), and he saw no reason why the same could not be done with the present draft articles.

329. Concerning draft article 8, the Special Rapporteur confirmed that it would be followed by other provisions that will explain the scope and limits of the exercise by an affected State of its primary responsibility to protect persons affected by a disaster. The Special Rapporteur could not support a proposal to delete paragraph 2 as it would run counter to existing regulation and practice in the field. In his view, draft article 8, specifically paragraph 2, provided necessary recognition of the fact that the principles of sovereignty and non-intervention were in effect. He recalled further the proposal, made during the debate, to include specific mention of the latter two principles, and while he did not consider it strictly necessary, he would follow the prevailing opinion in the Commission to make such a reference in either draft article 6 or 8.

C. Text of the draft articles on protection of persons in the event of disasters provisionally adopted so far by the Commission

1. Text of the draft articles

330. The text of the draft articles provisionally adopted so far by the Commission is reproduced below.

Protection of persons in the event of disasters

Article 1
Scope

The present draft articles apply to the protection of persons in the event of disasters.

Article 2
Purpose

The purpose of the present draft articles is to facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights.

Article 3
Definition of disaster

"Disaster" means a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society.

Article 4
Relationship with international humanitarian law

The present draft articles do not apply to situations to which the rules of international humanitarian law are applicable.

Article 5
Duty to cooperate

In accordance with the present draft articles, States shall, as appropriate, cooperate among themselves, and with the United Nations and other competent intergovernmental organizations, the International Federation of the Red Cross and Red Crescent Societies and the International Committee of the Red Cross, and with relevant non-governmental organizations.

2. Text of the draft articles and commentaries thereto provisionally adopted by the Commission at its sixty-second session

331. The text of the draft articles, together with commentaries thereto, provisionally adopted by the Commission at its sixty-second session is reproduced below.

Article 1
Scope

The present draft articles apply to the protection of persons in the event of disasters.

Commentary

(1) Article 1 establishes the scope of the draft articles, and tracks the formulation of the title of the topic. It establishes the orientation of the draft articles as being primarily focused on the protection of persons whose life, well-being and property are affected by disasters. Accordingly, as established in article 2, the focus is on facilitating a response that adequately and effectively meets the essential needs of the persons concerned, while respecting their rights.

(2) The draft articles cover, *ratione materiae*, the *rights and obligations* of States affected by a disaster in respect of persons present on their territory (irrespective of nationality), third States and international organizations and other entities in a position to cooperate, particularly in the provision of disaster relief and assistance. Such rights and obligations are understood to apply on two axes: the rights and obligations of States in relation to one another, and the rights and obligations of States in relation to persons in need of protection. While the focus is on the former, the draft articles also contemplate, albeit in general terms, the rights of individuals affected by disasters, as established by international law. Furthermore, as is elaborated in article 3, the draft articles are not limited to any particular type of disaster.

(3) The scope *ratione personae* of the draft articles is limited to natural persons affected by disasters, although the possibility of including legal persons may be considered in the future. In addition, the focus is primarily on the activities of States and international organizations and other entities enjoying specific international legal competence in the provision of disaster relief and assistance in the context of disasters. The activities of non-governmental organizations and other private actors, sometimes collectively referred to as "civil society" actors, are included within the scope of the draft articles only in a secondary manner, either as direct beneficiaries of duties placed on States (for example, of the duty of States to cooperate, in article 5) or indirectly, as being subject to the domestic laws, implementing the draft articles, of either the affected State, a third State or the State of nationality of the entity or private actor.

(4) As suggested by the phrase "in the event of" in the title of the topic, the scope of the draft articles *ratione temporis* is primarily focused on the immediate post-disaster response and recovery phase, including the post-disaster reconstruction phase. Nonetheless, it was generally agreed that the draft articles should also, where relevant, cover the pre-disaster phase as relating to disaster risk reduction and disaster prevention and mitigation activities.

(5) The draft articles are not limited, *ratione loci*, to activities in the arena of the disaster, but also cover those within assisting States and transit States. Nor is the transboundary nature of a disaster a necessary condition for the triggering of the application of the draft articles. Certainly, it is not uncommon for major disasters to have a transboundary effect, thereby increasing the need for international cooperation and coordination. Nonetheless, examples abound of major international relief assistance efforts

being undertaken in response to disasters occurring solely within the territorial boundaries of a single State. While different considerations may arise, unless otherwise specified, no such distinction is maintained in the draft articles. In other words, the draft articles are not tailored with any specific disaster type or situation in mind, but are intended to be applied flexibly to meet the needs arising from all disasters, regardless of their transboundary effect.

Article 2
Purpose

The purpose of the present draft articles is to facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights.

Commentary

(1) Article 2 deals with the purpose of the draft articles. While it is not always the case for texts prepared by the Commission to include a provision outlining the objectives of the draft articles in question, it is not unprecedented. The 2006 Draft Principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities include a provision (draft article 3) on purposes.

(2) The provision elaborates on article 1 (scope) by providing further guidance on the purport of the draft articles. The main issue raised relates to the juxtaposition of "needs" versus "rights". The Commission was aware of the debate in the humanitarian assistance community on whether a "rights-based", as opposed to the more traditional "needs-based" approach was to be preferred, or vice versa. The prevailing sense of the Commission was that the two approaches were not necessarily mutually exclusive, but were best viewed as being complementary. The Commission settled for a formulation that emphasized the importance of a response which adequately and effectively meets the "needs" of persons affected by the disaster. Such response has to take place with full respect for the rights of such individuals.

(3) Although not necessarily a term of art, by "adequate and effective", what is meant is a high-quality response that meets the needs of the persons affected by the disaster. Similar formulations are to be found in existing agreements. These include "effective and concerted" and "rapid and effective", found in the ASEAN Agreement on Disaster Management and Emergency Response of 2006, as well as "proper and effective", used in the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, of 1998. Given the context in which such response is to be provided, an element of timeliness is implicit in the term "effective". The more drawn-out the response the less likely it is that it will be effective. This and other aspects of what makes a response "adequate" and "effective" will be the subject of specific provisions. Notwithstanding this, it is understood that while a high standard is called for, it has, nonetheless, to be based in what is realistic and feasible "on the ground" in any given disaster situation. Hence, no reference is made, for example, to the response having to be "fully" effective.

(4) The Commission decided not to formulate the provision in the form of a general statement on the obligation of States to ensure an adequate and effective response, as it was felt that it would not sufficiently highlight the specific rights and obligations of the affected State. It was not clear, for example, whether such formulation would sufficiently distinguish different obligations for different States, such as for the affected State as opposed to assistance-providing States. Accordingly, a reference to States was not included, on the understanding that it was not strictly necessary for a provision on the purpose of the

draft articles, and that specific provisions on the obligations of States would be considered in subsequent articles.

(5) The phrase "response to disasters" needs to be read in conjunction with the general direction in article 1 that the temporal application of the draft articles needs to be viewed, where relevant, to include the pre-disaster risk-reduction, prevention and mitigation phase. While other formulations specifying all the phases of assistance were considered, the Commission opted for the present, more economical, phrasing, without intending to favour a strict interpretation that would render the provision applicable only to the response phase of disaster assistance activities.

(6) The word "facilitate" reflects the vision of the Commission for the role the draft articles might play in the overall panoply of instruments and arrangements that exist at the international level in the context of disaster relief and assistance. It was felt that while the draft articles could not by themselves *ensure* a response, they were intended to *facilitate* an adequate and effective response.

(7) The qualifier "essential" before the term "needs" was included in order to indicate more clearly that the needs being referred to are those related to survival or similarly essential needs in the aftermath of a disaster. It was felt that "essential" clearly brought out the context in which such needs arise.

(8) By "persons concerned" what is meant are people directly affected by the disaster, as opposed to individuals more indirectly affected. This term was included so as to further qualify the scope of application of the draft articles. This is in conformity with the approach taken by existing instruments, which focus on the provision of relief to persons directly affected by a disaster. This is not to say that individuals who are more indirectly affected, for example, through loss of family members in a disaster or who suffered economic loss owing to a disaster elsewhere, would be without remedy. Instead, it is not the intention of the Commission to cover their situation in the present draft articles.

(9) As regards the reference to rights, it was understood that some of the relevant rights are economic and social rights, which States have an obligation to ensure progressively. As such, the present formula of "with full respect for" was accepted as being more neutral, but nonetheless carries an active connotation of the rights being "fully" respected. In addition, the phrase intentionally leaves the question of *how* those rights are to be enforced to the relevant rules of international law themselves. The Commission did consider the possibility of including a further qualifier such as: "as appropriate", "as far as possible", "to the extent possible", "as required by the present draft articles", "in accordance with relevant provisions of international and domestic law" and "applicable rights". None of these was included since it was felt that adding further qualifiers risked diluting existing legal rights. Nonetheless, it is understood that there is an implied degree of latitude in the applicability of rights, conditioned by the extent of the impact of the disaster. The extent of such latitude, as far as it is not covered by the draft articles being developed by the Commission, is to be ascertained by the relevant rules recognizing or establishing the rights in question.

(10) The reference to "rights" is not only a reference to human rights, but also, *inter alia*, to rights acquired under domestic law. A suggestion to draw up a list of applicable rights did not meet with approval for the simple reason that it is not possible to consider all potentially applicable rights, and out of concern that such a list could lead to an *a contrario* interpretation that rights not mentioned therein were not applicable. Nonetheless, it is contemplated that the reference would include such applicable rights as the right to life, as

recognized in article 6, paragraph 1, of the International Covenant on Civil and Political Rights.[1300]

Article 3
Definition of disaster

"Disaster" means a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society.

Commentary

(1) Draft article 3 seeks to define the term "disaster" for the purpose of the draft articles. It was considered necessary to delimit the definition so as to properly capture the scope of application of the draft articles, as established in article 1, while not, for example, inadvertently also dealing with other serious events, such as political and economic crises, which may also undermine the functioning of society. Such delimitation of the definition is evident from two features of the definition: (1) the emphasis placed on the existence of an event which caused the disruption of society; and (2) the inclusion of a number of qualifying phrases.

(2) The Commission considered the approach of the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations of 1998, of conceptualizing a disaster as being the *consequence* of an event, namely the serious disruption of the functioning of society caused by that event, as opposed to being the event itself. The Commission was aware that such approach represented contemporary thinking in the humanitarian assistance community, as confirmed by the 2005 World Conference on Disaster Reduction, convened by the United Nations at Hyogo in Japan, as well as by recent treaties and other instruments, including the 2007 IFRC Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance. Nonetheless, the prevailing view was that the Commission was free to shift the emphasis back to the earlier conception of "disaster" as being a specific event, since it was embarking on the formulation of a legal instrument, which required a more concise and precise legal definition, as opposed to one that is more policy-oriented.

(3) The element of the existence of an event is qualified in several ways. First, the reference to a "calamitous" event serves to establish a threshold, by reference to the nature of the event, whereby only extreme events are covered. This was inspired by the definition adopted by the Institute of International Law at its 2003 Bruges session, which deliberately established such higher threshold so as to exclude other acute crises. What constitutes "calamitous" is to be understood both by application of the qualifier in the remainder of the provision, viz. "... resulting in widespread loss of life, great human suffering and distress or large-scale material or environmental damage, thereby seriously disrupting the functioning of society"; and by keeping in mind the scope and purpose of the draft articles, as articulated in articles 1 and 2. In addition, reference is made to "event or series of events" in order to cover those types of events which, on their own, might not meet the necessary threshold, but which, taken together, would constitute a calamitous event for purposes of the draft articles. No limitation is included concerning the origin of the event, i.e. whether natural or man-made, in recognition of the fact that disasters often arise from complex sets of causes that may include both wholly natural elements and contributions from human activities.

[1300] United Nations, *Treaty Series*, vol. 999, p. 171 and vol. 1057, p. 407. See too: Inter-Agency Standing Committee (IASC) Operational Guidelines on Human Rights and Natural Disasters, 2006.

(4) The event is further qualified by two causation requirements. First for the event, or series of events, to be considered "calamitous", in the sense required by the draft articles, it has to result in one or more of three possible outcomes: widespread loss of life, or great human suffering and distress, or large-scale material or environmental damage. Accordingly, a major event such as a serious earthquake, which takes place in the middle of the ocean or in an uninhabited area, and which accordingly does not result in at least one of the three envisaged outcomes, would not satisfy the threshold requirement in article 3. In addition, the nature of the event is further qualified by the requirement that any, or all, of the three possible outcomes, as applicable, result in the serious disruption of the functioning of society. In other words, an event which resulted in, for example, the widespread loss of life, but does not seriously disrupt the functioning of society, would not, accordingly, satisfy the threshold requirement. Hence, by including such causal elements, the definition retains aspects of the approach taken in contemporary texts, as exemplified by the Tampere Convention, namely by considering the consequence of the event as a key aspect of the definition, albeit for purposes of establishing the threshold for the application of the draft articles.

(5) The element of "widespread loss of life" is a refinement, inspired by the 1995 Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief. The requirement of "widespread" loss of life serves to exclude isolated events which result in relatively low loss of life; it being borne in mind that such events could nonetheless satisfy one of the other causal requirements. Conversely, an event causing widespread loss of life could, on its own, satisfy the causation requirement and could result in the triggering of the application of the draft articles if it resulted in the serious disruption of the functioning of society.

(6) The possibility of "great human suffering and distress" was included out of recognition that many major disasters are accompanied by widespread loss of life or by great human suffering and distress. Accordingly, cases where an event has resulted in relatively localized loss of life, owing to adequate prevention and preparation, as well as effective mitigation actions, but nonetheless has caused severe dislocation resulting in great human suffering and distress which seriously disrupt the functioning of society, would be covered by the draft articles.

(7) "Large-scale material or environmental damage" was included by the Commission in recognition of the wide-scale damage to property and the environment typically caused by major disasters, and the resultant disruption of the functioning of society arising from the severe setback for human development and well-being that such a loss typically causes. It is to be understood that it is not the environmental or property loss *per se* that would be covered by the draft articles, but rather the impact on persons of such loss; thus avoiding a consideration of economic loss in general. A requirement of economic loss might unnecessarily limit the scope of the draft articles, by, for example, precluding them from also dealing with activities designed to mitigate potential future human loss arising from existing environmental damage.

(8) As already alluded to, the requirement of serious disruption of the functioning of society serves to establish a high threshold which would exclude from the scope of application of the draft articles other types of crises such as serious political or economic crises. Such differences in application is further borne out by the purpose of the draft articles, as established in article 2, and by the fact that the type of protection required, and rights involved, in those other types of crises may be different, and are, to varying extents, regulated by other rules of international law. While the three possible outcomes envisaged provide some guidance on what might amount to a serious disruption of the functioning of society, the Commission refrained from providing further descriptive or qualifying elements, so as to leave some discretion in practice.

Article 4
Relationship with international humanitarian law

The present draft articles do not apply to situations to which the rules of international humanitarian law are applicable.

Commentary

(1) Article 4 deals with the relationship of the draft articles with international humanitarian law, and, accordingly, the extent to which the draft articles cover situations of armed conflict, which can have an equally calamitous impact on the functioning of societies. The provision is formulated in a manner intended to clarify such relationship by giving precedence to the rules of international humanitarian law in situations where they are applicable.

(2) The Commission considered including an express exclusion of the applicability of the draft articles over armed conflict as a further element in the definition of "disaster" (article 3), so as to avoid any interpretation that, for purposes of the draft articles, armed conflict would be covered to the extent that the threshold criteria in draft article 3 were satisfied. Such approach was not followed since a categorical exclusion could be counterproductive, particularly in situations of "complex emergencies" where a disaster occurs in an area where there is an armed conflict. A blank exclusion of the applicability of the draft articles because of the coexistence of an armed conflict would be detrimental to the protection of the victims of the disaster, especially when the onset of the disaster predated the armed conflict.

(3) The Commission also initially considered rendering the provision as a more straightforward "without prejudice" clause, merely preserving the applicability of both sets of rules, and thereby suggesting that the draft articles applied in the context of armed conflict to the same extent as existing rules of international law. Instead, the Commission settled for the current approach of addressing the matter in terms of the relationship between the draft articles and international humanitarian law. While the draft articles do not seek to regulate the consequences of armed conflict, they can nonetheless apply in situations of armed conflict to the extent that existing rules of international law, particularly the rules of international humanitarian law, do not apply.

Article 5
Duty to cooperate

In accordance with the present draft articles, States shall, as appropriate, cooperate among themselves, and with the United Nations and other competent intergovernmental organizations, the International Federation of the Red Cross and Red Crescent Societies and the International Committee of the Red Cross, and with relevant non-governmental organizations.

Commentary

(1) Effective international cooperation is indispensable for the protection of persons in the event of disasters. The duty to cooperate is well established as a principle of international law and can be found in numerous international instruments. The Charter of the United Nations enshrines it, not least with reference to the humanitarian context in which the protection of persons in the event of disasters places itself. Article 1 (3) of the Charter clearly spells out as one of the purposes of the Organization:

> "To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and

> encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."

Articles 55 and 56 of the Charter elaborate on Article 1 (3) with respect to international cooperation. Article 55 of the Charter reads:

> "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
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> "a. higher standards of living, full employment, and conditions of economic and social progress and development;
>
> "b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
>
> "c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

Article 56 of the Charter reads:

> "All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

The general duty to cooperate was reiterated as one of the principles of international law in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations in the following terms:

> "States have the duty to cooperate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international cooperation free from discrimination based on such differences."[1301]

(2) Cooperation takes on special significance with regard to international human rights law. The International Covenant on Economic, Social and Cultural Rights refers explicitly to international cooperation as a means of realizing the rights contained therein.[1302] This has been reiterated by the Committee on Economic, Social and Cultural Rights in its general comments relating to the implementation of specific rights guaranteed by the Covenant.[1303] International cooperation gained particular prominence in the 2006 Convention on the Rights of Persons with Disabilities which is, *inter alia*, applicable "in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters".[1304]

(3) With regard to cooperation in the context of disaster relief and assistance, the General Assembly recognized, in resolution 46/182, that:

> "[t]he magnitude and duration of many emergencies may be beyond the response capacity of many affected countries. International cooperation to address emergency

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[1301] General Assembly resolution 2625 (XXV) of 24 October 1970, annex, para. 1.

[1302] General Assembly resolution 2200 A (XXI), annex, arts. 11, 15, 22 and 23.

[1303] See, in particular, general comments No. 2 (E/1990/23), No. 3 (E/1991/23), No. 7 (E/1998/22), No. 14 (E/C.12/2000/4) and No. 15 (E/C.12/2002/11).

[1304] General Assembly resolution 61/106 of 13 December 2006, annex I, art. 11.

> situations and to strengthen the response capacity of affected countries is thus of great importance. Such cooperation should be provided in accordance with international law and national laws ..."[1305]

In addition, there exist a vast number of instruments of specific relevance to the protection of persons in the event of disasters which demonstrate the importance of the imperative of international cooperation in combating the effects of disasters. Not only are these instruments in themselves expressions of cooperation, they generally reflect the principle of cooperation relating to specific aspects of disaster governance in the text of the instrument. Typically in bilateral agreements, this has been reflected in the title given to the instrument, denoting either cooperation or (mutual) assistance.[1306] Moreover, the cooperation imperative, in the vast majority of cases, is framed as one of the objectives of the instrument or is attributed positive effects towards their attainment. Again, the Tampere Convention is of relevance in this respect as it indicates in paragraph 21 of its preamble that the parties wish "to facilitate international cooperation to mitigate the impact of disaster". Another example can be found in an agreement between France and Malaysia:

> "Convinced of the need to develop cooperation between the competent organs of both Parties in the field of the prevention of grave risks and the protection of populations, property and the environment ..."[1307]

(4) Cooperation should, however, not be interpreted as diminishing the prerogatives of a sovereign State within the limits of international law; this point will be addressed in a subsequent article. Furthermore, the principle of cooperation is to be understood also as being complementary to the primary duty of the authorities of the affected State to take care of the victims of natural disasters and similar emergencies occurring in its territory.[1308] The provision has to be read in light of the other provisions in the draft articles, particularly those on the primary duty of the affected State.

(5) A key feature of activity in the field of disaster relief assistance is international cooperation not only among States, but also with international and non-governmental organizations. The importance of their role has been recognized for some time. In resolution 46/182 of 19 December 1991, the General Assembly confirmed that:

> "... [i]ntergovernmental and non-governmental organizations working impartially and with strictly humanitarian motives should continue to make a significant contribution in supplementing national efforts."[1309]

In a resolution adopted in 2008, the Economic and Social Council recognized,

> "... the benefits of engagement of and coordination with relevant humanitarian actors to the effectiveness of humanitarian response, and encourage[d] the United Nations to continue to pursue efforts to strengthen partnerships at the global level with the International Red Cross and Red Crescent Movement, relevant humanitarian non-

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[1305] Annex, para. 5.

[1306] See A/CN.4/590/Add.2 for a comprehensive list of relevant instruments. For a further typology of instruments for the purposes of international disaster response law, see H. Fischer, "International disaster response law treaties: trends, patterns, and lacunae" in IFRC, International disaster response laws, principles and practice: reflections, prospects and challenges (2003), at pp. 24–44.

[1307] Agreement between the Government of the French Republic and the Government of Malaysia on Cooperation in the Field of Disaster Prevention and Management and Civil Security, 25 May 1998, preambular paragraph 4.

[1308] Resolution 46/182 of 19 December 1991, annex, para. 4. See also Hyogo Declaration 2005, A/CONF.206/6 and Corr.1, chap. 1, resolution 1, para. 4.

[1309] Annex, para. 5.

governmental organizations and other participants of the Inter-Agency Standing Committee."[1310]

(6) Article 5 recognizes the central importance of international cooperation to international disaster relief and assistance activities. It establishes a legal obligation for the various parties concerned. It was understood, however, that the nature of the obligation of cooperation may vary, depending on the actor and the context in which assistance is being sought and offered. By its nature, cooperation is reciprocal, so that a duty for a State to cooperate with an international organization, for example, implies the same duty on the part of the organization. It was found that attempting to separate out cooperation between States, and that between States and international organizations (particularly the United Nations), the International Federation of the Red Cross, and that with "relevant non-governmental organizations", did not adequately capture the range of possible legal relationships between States and the various entities mentioned in the provision. Nor was it necessary to spell out the exact nature of the legal obligation to cooperate in a general provision on cooperation. Such matters are to be dealt with in specific provisions to be adopted in the future (hence the opening phrase "[i]n accordance with the present draft articles"). Accordingly, the Commission inserted the phrase "as appropriate" which qualifies the entire draft article, by serving both as a reference to existing specific rules on cooperation between the various entities mentioned in the draft article (including those such rules to be added to the draft articles in the future) which establish the nature of the obligation to cooperate, and as an indication of a degree of latitude in determining, on the ground, when cooperation is or is not "appropriate".

(7) The qualifier "competent" before "intergovernmental organizations" was included as an indication that, for purposes of the draft articles, cooperation would only be necessary with those entities that are involved in the provision of disaster relief and assistance. A reference to the International Committee of the Red Cross is included as a consequence of the fact that the draft articles may also apply in complex emergencies involving armed conflict.

[1310] Resolution 2008/36 of 25 July 2008, para. 7.

Chapter VIII
The obligation to extradite or prosecute
(*aut dedere aut judicare*)

A. Introduction

332. The Commission, at its fifty-seventh session (2005), decided to include the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)" in its programme of work and appointed Mr. Zdzislaw Galicki as Special Rapporteur.[1311]

333. From its fifty-eighth (2006) to its sixtieth (2008) sessions, the Commission received and considered three reports of the Special Rapporteur.[1312]

334. At its sixtieth session (2008), the Commission decided to establish a working group on the topic under the chairmanship of Mr. Alain Pellet, the mandate and membership of which would be determined at the sixty-first session.[1313] At the sixty-first session (2009), an open ended Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*) was established, and culminating from its discussion, a general framework for consideration of the topic, with the aim of specifying the issues to be addressed, was drawn up.[1314]

B. Consideration of the topic at the present session

335. At the present session the Commission reconstituted the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*), which, in the absence of its chairman, was chaired by Mr. Enrique Candioti.

336. At its 3071st meeting, on 30 July 2010, the Commission took note of the oral report presented by the temporary Chairman of the Working Group.

Discussions of the Working Group

337. The Working Group held two meetings on 27 and 28 July 2010. It continued its discussions with the aim of specifying the issues to be addressed to further facilitate the work of the Special Rapporteur. It had before it a Survey of multilateral conventions which may be of relevance for the Commission's work on the topic, prepared by the Secretariat (A/CN.4/630),[1315] together with the general framework prepared by the Working Group in

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[1311] At its 2865th meeting, on 4 August 2005 (*Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 500). The General Assembly, in paragraph 5 of resolution 60/22 of 23 November 2005, endorsed the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its fifty-sixth session (2004), on the basis of the proposal annexed to that year's report (*Official Records of the General Assembly, Fifty ninth Session, Supplement No. 10* (A/59/10), paras. 362–363).

[1312] A/CN.4/571 (preliminary report); A/CN.4/585 and Corr.1 (second report); and A/CN.4/603 (third report).

[1313] At its 2988th meeting, on 31 July 2008 (*Official Records of the General Assembly, Sixty third Session, Supplement No. 10* (A/63/10), para. 315).

[1314] For the proposed general framework prepared by the Working Group, see *ibid., Sixty fourth Session, Supplement No. 10* (A/64/10), para. 204.

[1315] For the comments and information before the Commission at its fifty-ninth (2007), sixtieth (2008) and sixty-first (2009) sessions, see: A/CN.4/579 and Add.1–4, A/CN.4/599 and A/CN.4/612.

2009.[1316] The Survey identified 61 multilateral instruments, at the universal and regional levels, that contain provisions combining extradition and prosecution as alternative courses of action for the punishment of offenders. It proposed a description and a typology of the relevant instruments in light of these provisions, and examined the preparatory work of certain key conventions that have served as models in the field, as well as the reservations made to the relevant provisions. It also pointed out the differences and similarities between the reviewed provisions in different conventions and their evolution. Based on the Survey, overall conclusions were offered in the Survey as to: (a) the relationship between extradition and prosecution in the relevant provisions; (b) the conditions applicable to extradition under the various conventions; and (c) the conditions applicable to prosecution under the various conventions.

338. The Working Group also had before it a working paper prepared by the Special Rapporteur, entitled "Bases for discussion in the Working Group on the topic 'The obligation to extradite or prosecute (*aut dedere aut judicare*)'" (A/CN.4/L.774), containing observations and suggestions, based on the general framework prepared in 2009 and further drawing upon the Survey by the Secretariat. In particular, the Special Rapporteur drew attention to questions concerning: (a) the legal bases of the obligation to extradite or prosecute; (b) the material scope of the obligation to extradite or prosecute; (c) the content of the obligation to extradite or prosecute; (d) the conditions for the triggering of the obligation to extradite or prosecute.

339. The Working Group affirmed the continuing relevance of the general framework agreed in 2009. It was recognized that the Secretariat Survey had helped to elucidate aspects of the general framework, had helped to clarify issues concerning the typology of treaty provisions, differences and similarities in the formulation of the obligation to extradite or prosecute in these provisions and their evolution, under the rubric "the legal bases of the obligation to extradite or prosecute" of the general framework. It was also noted that, in seeking to throw light on the questions agreed upon in the general framework, the multilateral treaty practice on which the Secretariat survey had focused needed to be complemented by a detailed consideration of other aspects of State practice (including but not limited to national legislation, case law, official statements of governmental representatives). In addition, it was pointed out that, as far as the duty to cooperate in the fight against impunity seemed to underpin the obligation to extradite or prosecute, a systematic assessment, based on State practice, needed to be made of the extent to which that duty could elucidate, as a general rule or in relation to specific crimes, work on the topic, including work in relation to the material scope, the content of the obligation to extradite or prosecute and the conditions for the triggering of that obligation.

340. The Working Group reaffirmed, taking into account the practice of the Commission in the progressive development of international law and its codification, that the general orientation of future reports of the Special Rapporteur should be towards presenting draft articles for consideration by the Commission, based on the general framework agreed in 2009.

[1316] *Official Records of the General Assembly, Sixty fourth Session, Supplement No. 10* (A/64/10), para. 204.

Chapter IX
Immunity of State officials from foreign criminal jurisdiction

A. Introduction

341. The Commission, at its fifty-ninth session (2007), decided to include the topic "Immunity of State officials from foreign criminal jurisdiction" in its programme of work and appointed Mr. Roman A. Kolodkin as Special Rapporteur.[1317] At the same session, the Commission requested the Secretariat to prepare a background study on the topic.[1318]

342. At its sixtieth session (2008), the Commission considered the preliminary report of the Special Rapporteur (A/CN.4/601). The Commission had also before it a memorandum by the Secretariat on the topic (A/CN.4/596 and Corr.1). In the absence of a further report the Commission was unable to consider the topic at its sixty-first session (2009).

B. Consideration of the topic at the present session

343. At the present session, the Commission was not in a position to consider the second report of the Special Rapporteur, which was submitted to the Secretariat.

[1317] At its 2940th meeting, on 20 July 2007 (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 376). The General Assembly, in paragraph 7 of resolution 62/66 of 6 December 2007, took note of the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its fifty-eighth session (2006), on the basis of the proposal contained in annex A of the report of the Commission (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 257).

[1318] *Ibid., Sixty-second Session, Supplement No. 10* (A/62/10), para. 386.

Chapter X
Treaties over time

A. Introduction

344. The Commission, at its sixtieth session (2008), decided to include the topic "Treaties over time" in its programme of work and to establish a Study Group on the topic at its sixty-first session.[1319] At its sixty-first session (2009), the Commission established the Study Group on Treaties over time, chaired by Mr. Georg Nolte. At that session, the Study Group focused its discussions on the identification of the issues to be covered, the working methods of the Study Group and the possible outcome of the Commission's work on the topic.[1320]

B. Consideration of the topic at the present session

345. At the present session, the Study Group on Treaties over time was reconstituted under the chairmanship of Mr. Georg Nolte.

346. At its 3071st meeting, on 30 July 2010, the Commission took note of the oral report of the Chairman of the Study Group on Treaties over time, and approved the recommendation of the Study Group that a request for information be included in Chapter III of the Commission's report and also brought to the attention of States by the Secretariat.[1321]

1. Discussions of the Study Group

347. The Study Group held four meetings, on 5 and 26 May, and on 28 July 2010.

348. The Study Group began its work on the aspects of the topic relating to subsequent agreements and practice, on the basis of an introductory report prepared by its Chairman on the relevant jurisprudence of the International Court of Justice and arbitral tribunals of *ad hoc* jurisdiction.

349. The introductory report addressed a number of questions including: terminological issues; the general significance of subsequent agreements and practice in treaty interpretation; the question of inter-temporal law; the relationship between evolutionary interpretation and subsequent agreements and practice; the various elements of subsequent agreements and practice, including: the beginning and the end of the relevant period within which this phenomenon may take place, the identification of a common understanding or agreement by the parties, including the potential role of silence, questions of attribution of conduct to the State; as well as subsequent agreements and practice as a possible means of treaty modification.

350. These various questions were the subject of preliminary discussions within the Study Group. However, due to lack of time, the consideration of the section relating to a possible

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[1319] At its 2997th meeting, on 8 August 2008. (*Official Records of the General Assembly, Sixty third Session, Supplement 10* (A/63/10), para. 353). For the syllabus of the topic, see *ibid.*, Annex A. The General Assembly, in para. 6 of its resolution 63/123 of 11 December 2008, took note of the decision.

[1320] See *Official Records of the General Assembly, Sixty fourth Session, Supplement 10* (A/64/10), paras. 220–226.

[1321] See below, para. 354.

modification of a treaty by subsequent agreements and practice had to be deferred until next year.

351. Aspects that were touched upon during the discussions in the Study Group included: whether different judicial or quasi-judicial bodies have a different understanding of, or have a tendency to give a different weight to, subsequent agreements and practice in the interpretation of treaties; whether the relevance and significance of subsequent agreements and practice may vary depending on factors relating to the treaty concerned, such as its age, its subject-matter or its past – or future-oriented nature. It was generally felt, however, that no definitive conclusions could be drawn on these issues at this stage.

352. During the 1st meeting of the Study Group in May 2010, some members expressed the wish that additional information be provided on relevant aspects of the preparatory work of the 1969 Vienna Convention on the Law of Treaties. The Chairman therefore presented to the Study Group, at its 3rd meeting, an addendum to his introductory report, dealing with the preparatory work of the Vienna Convention relating to the rules on the interpretation and modification of treaties, and on the inter-temporal law. The addendum addressed the work of the Commission concerning the elaboration, on first and on second reading, of the draft articles relating to the interpretation and modification of treaties, as well as the modifications introduced to those draft articles by the 1969 Vienna Convention on the Law of Treaties. The addendum concluded that paragraphs (3) (a) and (b) of Article 31 of the Vienna Convention on the Law of Treaties on "subsequent agreements" and "subsequent practice" were the remnants of a more ambitious plan by the Commission to deal also with the inter-temporal law and the modification of treaties. This more ambitious plan could not be realized for various reasons, in particular the difficulties of formulating in an appropriate way a general rule on the inter-temporal law and the resistance by States during the Vienna Conference to accept an explicit rule on the informal modification of treaties by way of subsequent practice. It does not seem, however, that clear differences in substance led to the abandoning of the initial, more ambitious plan.

2. Future work and request for information

353. The Study Group also discussed its future work. It is expected that, during the sixty-third session of the Commission (2011), the Study Group will first complete its discussion of the introductory report prepared by its Chairman, and will then move to a second phase of its work on subsequent agreements and practice, namely the analysis of the jurisprudence of courts or other independent bodies under special regimes. This will be done on the basis of a report to be prepared by the Chairman of the Study Group. In parallel, other contributions are expected to be made by some members on specific issues.

354. At its meeting on 28 July 2010, the Study Group also examined the possibility that a request for information from Governments be included in Chapter III of the Commission's report on the current session, and that this request be brought to the attention of Governments by the Secretariat. It was generally felt in the Study Group that information provided by Governments in relation to this topic would be very useful, in particular with respect to the consideration of instances of subsequent practice and agreements that have not been the subject of a judicial or quasi-judicial pronouncement by an international body. Therefore, the Study Group recommended to the Commission that Chapter III of this year's report include a section containing a request for information on the topic "Treaties over time", and that this request be brought to the attention of States by the Secretariat.

Chapter XI
The Most-Favoured-Nation clause

A. Introduction

355. The Commission, at its sixtieth session (2008), decided to include the topic "The Most Favoured-Nation clause" in its programme of work and to establish a Study Group on the topic at its sixty-first session.[1322]

356. A Study Group, co-chaired by Mr. Donald M. McRae and Mr. A. Rohan Perera, was established at the sixty-first session (2009), during which it considered, *inter alia*, a framework that would serve as a road map for future work and agreed on a work schedule involving the preparation of papers intended to shed additional light on questions concerning, in particular, the scope of MFN clauses and their interpretation and application.[1323]

B. Consideration of the topic at the present session

357. At the present session, the Commission reconstituted the Study Group on The Most-Favoured-Nation clause, co-chaired by Mr. Donald M. McRae and Mr, A. Rohan Perera.

358. At its 3071st meeting, on 30 July 2010, the Commission took note of the oral report of the Co Chairmen of the Study Group.

1. Discussions of the Study Group

359. The Study Group held 3 meetings on 6 May and on 23 and 29 July 2010. It considered and reviewed the various papers prepared on the basis of the framework to serve as a road map of future work, which was decided upon in 2009, and agreed upon a programme of work for next year. It had before it several papers prepared by members of the Study Group: These papers serve as the background context that seeks to illuminate further the challenges of the MFN clause in contemporary times, by looking at the typology of existing MFN provisions, the areas of relevance of the 1978 draft articles, how MFN has developed and is developing in the context of the GATT and the WTO, other activities that have been carried out particularly in the context of the OECD and UNCTAD, where substantial work has been accomplished on the subject, as well as analyzing some of the contemporary issues concerning the scope of application of the clause, such as those arising in the *Maffezini* case.

(a) *Catalogue of MFN provisions* (Mr. D.M. McRae and Mr. A.R. Perera)

360. This paper provided a preliminary categorization of MFN clauses as they appear in various bilateral investment agreements (BITs) and free trade area agreements (FTAs). Rather than reproducing a catalogue of more than 3000 BITs and FTAs that had been

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[1322] At its 2997th meeting, on 8 August 2008, (*Official Records of the General Assembly, Sixty third Session, Supplement No. 10* (A/63/10), para. 354). For the syllabus of the topic, see *ibid.*, Annex B. The General Assembly, in paragraph 6 of its resolution 63/123 of 11 December 2008, took note of the decision.

[1323] At its 3029th meeting, on 31 July 2009, the Commission took note of the oral report of the Co Chairmen of the Study Group on The Most-Favoured-Nation clause (*ibid., Sixty fourth Session, Supplement No. 10* (A/64/10), paras. 211–216).

concluded, an analysis of trends reflecting MFN practice in select treaties and agreements was undertaken. It was considered that this typological approach could be more useful to the work of the Study Group. In this connection, the catalogue contained four broad categories, namely (a) a sampling of MFN provisions in BITs and FTAs giving general treatment; (b) MFN provisions in treaties that gave specific treatment; these were in turn sub-divided into provisions dealing with the post-establishment phase and the pre-establishment phase; (c) provisions of exceptions within the MFN provision; and (d) provisions of exceptions outside the specific MFN clause. This is an on-going exercise and the categorization may be subject to subsequent adjustments.

(b) *The 1978 draft articles of the International Law Commission* (Mr. S. Murase)

361. This paper reviewed, in a preliminary and non-exhaustive manner, the draft articles on MFN clauses adopted by the Commission in 1978, focusing on their contemporary utility, without making any suggestions for any concrete amendments. The working paper identified a number of relevant and closely interrelated factors of change bearing on the 1978 draft articles, which had occurred, including: (a) a shift in importance of MFN clauses from trade to investment; (b) the proliferation of bilateral investment treaties (BITs); (c) the strengthened multilateral framework of the WTO/GATT scheme for trade; (d) the failure of negotiations, conducted in 1995 through 1998, on a multilateral agreement on investment (MAI); (e) the development of regional integration, evidenced in EU, NAFTA and others regional frameworks; (f) the decline in enthusiasm for the New International Economic Order (NIEO); (g) closer cooperation among developing countries; and (h) the development of the dispute settlement mechanisms in the areas of trade and investment. Against this background of developments, the paper proceeded to examine the 1978 draft articles by clusters. Overall, it was concluded that some elements of the 1978 draft articles need to be re-examined, taking into account contemporary developments.[1324] It was suggested in the paper that the Commission, in collaboration with the Sixth Committee, should aim at drafting a new set of revised draft articles on MFN clauses in light of the review of the 1978 draft articles.

(c) *MFN in the GATT and the WTO* (Mr. D.M. McRae)

362. This paper provided an analysis of the way in which MFN had been interpreted and applied in the context of GATT and WTO agreements, focusing more on the practice in relation to WTO agreements and in particular the interpretation of those agreements through WTO dispute settlement.[1325] The general assessment was that in all the areas of the

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[1324] The provisions included, *inter alia*, draft articles concerning: definitional rules (draft articles 1 to 6), the *ejusdem generis* rule (draft articles 7 to 8), compensation (draft articles 11 to 15), bilateral and multilateral agreements (draft article 17), special consideration for developing countries (draft articles 23 to 24 and 30). Moreover, the customs union exception which was not treated in the draft articles would have to be reconsidered. The draft articles on national treatment (draft articles 18 to 19), MFN rights (draft articles 20, para. 1; 21, para. 1) and domestic law (draft article 22) appeared to be self-evident propositions and served as reminders, which were relevant today. However, they were not worthy of in-depth discussion at this stage. Further, the other remaining draft articles (draft articles 27 to 29) were essentially without prejudice clauses, and did not appear to require special consideration at this stage.

[1325] WTO Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (adopted 20 April 2004) [*EC – Tariff Preferences*]; *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R (adopted 19 June 2000) [*Canada – Autos*]; GATT Panel Report, *European Economic Community – Imports of Beef from Canada*, L/5099, adopted 10 March 1981, BISD 28S/92 [*EEC – Imports of Beef*]; GATT Panel Report, *United – Denial of Most-Favoured-Nation Treatment*

WTO agreements to which MFN applied — goods, services and intellectual property — MFN treatment had been treated as essential, fundamental, or as the cornerstone. It had been interpreted in a way as to give it maximum effect. This broad application appeared to draw no distinction between procedural and substantive benefits.[1326] It was also noted that there was nothing in the jurisprudence relating to MFN under GATT to suggest that procedural rights would be excluded from the application of MFN.[1327] Moreover, the application of MFN under the WTO seemed to be the same regardless of the different ways in which the principle had been formulated. The interpretation of MFN clauses under the WTO had been influenced more by a perception of the object and purpose of the provision, rather than by its precise wording.

363. At the same time, the scope of MFN was significantly curtailed by exceptions, both in general terms (e.g. those relating to customs unions and free trade areas) and, specifically (e.g. the carve-out in respect of trade in services that WTO Members were able to annex to GATS Article II). The breadth of such exceptions meant that the range of application of MFN could be in fact quite limited. As a result of the burgeoning of customs unions and FTAs, the majority of tariffs today were not applied on an MFN basis; they were applied under regional and other preferential GATT-exempt arrangements. The approach of the Appellate Body had been to interpret many of the exceptions narrowly.[1328] However, even with such a restrictive interpretation of individual applications of the exceptions, the substantive scope of the exceptions was far ranging and thus MFN under the WTO had more limited substantive application than the statement of the principle and its characterization as "fundamental" would suggest. The conclusions drawn were tentative; there was as yet insufficient jurisprudence on the interpretation of the MFN provisions under the WTO to be too definitive.

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as to Non-Rubber Footwear from Brazil, DS18/R, adopted 19 June 1992, BSD 39S/128 [*US – MFN Footwear*]; GATT Panel Report, *Spain – Tariff Treatment of Unroasted Coffee*, L/5135, adopted 11 June 1981, BISD 28S/102 [*Spain – Unroasted Coffee*]; WTO Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (adopted 25 September 1997) [*EC – Bananas*]; WTO Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R (adopted 19 November 1999) [*Turkey – Textiles*]; WTO Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (adopted 6 November 1998) [*US – Shrimp*]; WTO Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R (adopted 24 March 2006) [*Mexico – Soft Drinks*]; WTO Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R (adopted 1 November 1996) [*Japan – Alcohol*]; WTO Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (adopted 5 April 2001) [*EC – Asbestos*]; GATT Panel Report, *Belgian Family Allowances*, G/32, adopted 7 November 1952, BISD 1S/59 [*Belgium – Family Allowances*]; WTO Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R (adopted 23 July 1998) [*Indonesia – Autos*]; WTO Panel Reports, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/ECU, WT/DS27/R/MEX and WT/DS27/R/USA (circulated 22 May 1997); WTO Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R (adopted 2 January 2002) [*US – Section 211*].

[1326] GATT Panel Report, *United States Section 337 of the Tariff Act of 1930*, L/6439, adopted November 1989, BISD 36S/345.

[1327] Arguably, in the case of TRIPS this might be seen to flow from the broad meaning given to the term "protection" under TRIPS Article 3 and 4.

[1328] As the case in GATT Article XXIV in *Turkey – Textiles*, and to the chapeau to GATT Article XX, in *US – Shrimp* (see above, note 1325).

(d) *The Work of OECD on MFN* (Mr. M. Hmoud)

364. This paper considered and reviewed the substantial work that has been carried out within the OECD, drawing attention in particular to several instruments that had been negotiated in order to achieve the goals of the OECD, including the liberalization of capital movements and the free movement of goods.[1329] It also considered negotiations on the draft Multilateral agreement on investment (MAI) and issues raised therein, including the MFN clause whose scope covered the pre-establishment and post-establishment phases of investment, the work of the OECD on the terms "In like circumstances" and on issues such as the scope of the MFN treatment in relation to privatisation, intellectual property, investment incentives, monopolies and state enterprises, investment protection, and exceptions (general and specific) to MFN provision. It was noted that the work done by the OECD could offer useful guidance for the Study Group in its work.

(e) *The Work of UNCTAD on MFN* (Mr. S.C. Vasciannie)

365. This paper examined two substantial publications of UNCTAD,[1330] and considered other aspects of its work in collecting and analyzing State practice on the MFN standard in investment agreements. In particular, the paper discussed issues concerning the scope and definition of the MFN standard, the role of the MFN standard in protecting investors, different ways in which the standard has been formulated in various agreements and exceptions to the standard, including the provisions on regional economic integration organizations (REIOs), the reciprocity requirements and intellectual property considerations. It also identified certain issues concerning the MFN standard that had not been fully explored by UNCTAD, noting that some of these issues, including the status of the MFN standard in customary international law, the legal interpretation of different formulations of the standard and the relationship between treaty provisions and municipal law practice could be further considered. In reviewing the UNCTAD papers reference was also made to various policy questions such as the "free rider" and identity issues, pre-entry and post-entry clauses and the relationship between the MFN treatment standard and other standards of investment protection.

(f) *The* Maffezini *problem under investment treaties* (Mr. A.R. Perera)

366. This paper reviewed the development relating to the broad interpretation given by arbitral tribunals to the MFN clause in investment agreements, in a series of decisions relating to investment disputes starting with the *Maffezini* case. The principal problem arising out of the case was the question whether it could be determined with any certainty, what obligations a contracting party had undertaken when including the MFN clause within an investment treaty and in particular the relationship of the MFN clause to provisions relating to dispute settlement. A related question was whether substantive rights and protection standards contained in a treaty with a third State, which were more beneficial to an investor, could be relied upon by such an investor to his advantage, by virtue of the MFN clause.[1331]

[1329] The Code of Liberalisation of Capital Movements, covering direct investment and establishment, the OECD Code of Liberalisation of Invisible Operations concerning services; work on the draft Multilateral Agreement on Investment (1995–1998), as well as a series of published working papers related to international investments.

[1330] The UNCTAD Series on Issues in International Investment Agreements ("Issue Papers"); and the UNCTAD Follow-up Series on International Investment Policies for Development ("Follow-up Papers").

[1331] Cases following a cautious approach include, for example, *Tecmed v. Mexico* (Award), ICSID Case No. ARB/(AF)/00/2, 29 May 2003. See also *Salini* and *Plama* arbitrations; *CMS Gas Transmission*

367. The analysis of arbitral awards dealt with two types of claims where the MFN clause in the basic treaty was sought to be invoked to expand the scope of the dispute settlement provisions of such treaty, namely (a) to override the applicability of a provision requiring the submission of a dispute to a domestic court for a "waiting period" of 18 months, prior to submission to international arbitration; and (b) to broaden the jurisdictional scope in the basic treaty that restricted the ambit of the dispute settlement clause to a specific category of disputes, such as disputes relating to compensation for expropriation.[1332]

368. Following a review of recent arbitral practice, including *Maffezini* and subsequent developments, the paper stated that one of the important conclusions was that the particular form in which a MFN clause was drafted in a particular agreement mattered and depending on the wording of the applicable clause, a dispute could lead to different outcomes, giving rise to the need for legal certainty. Accordingly, some guidelines could assist States to determine with some degree of certainty whether they were granting broad rights or whether the rights they were granting were more circumscribed when they include an MFN clause in an investment treaty. Another underlying issue which arose from these decisions was the difficulty which surrounded any attempt to ascertain the intention of the parties. Although the criteria identified by the tribunals were helpful, there were still left open crucial issues which required discussion in determining possible guidelines on the scope of application of the MFN clause, whether in relation to existing treaties or future treaties.

2. Consideration of future work of the Study Group

369. The Study Group held wide-ranging discussions, on the basis of the papers before it, as well as developments elsewhere including within the context of MERCOSUR. Its central focus is on the issue of how MFN clauses are being interpreted, particularly in the context of investment relations and whether some common underlying guidelines could be

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Company v. Argentina, ICSID Case No. ARB 701/08, Award of 25 April 2005. Cases reflecting a liberal approach importing substantive protection standards, see for example *Siemens* arbitration; *MTD Equity Bhd v. Chile* (Award), ICSID Case ARB/01/7, 25 May 2004; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005. For treaty practice reacting to the liberal interpretation, the formulations in *the Chile-Columbia FTA of 27 November 2006* and the *Maffezini Note* in the *Draft Free Trade Agreement of the Americas*, FTAB.TRC/w/133/Rev.3, 21 November, 2003.

[1332] *Emilio Agustin Maffezini v. Kingdom of Spain* (Decision of the Tribunal on Objections to Jurisdiction), ICSID Case No. ARB 97/7, 25 January 2000, (2002) 5 ICSID Rep. p. 396. For cases following the reasoning in *Maffezini* and its implications, see for example: *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic* (Decision on Jurisdiction), ICSID Case No. ARB/03/17, 16 May 2006; *Siemens A.G. v. The Argentine Republic* (Decision on Jurisdiction), ICSID Case No. ARB/02/8, 3 August 2004; *Gas Natural SDG, S.A. v. The Argentine Republic* (Decision of the Tribunal on Preliminary Questions of Jurisdiction), ICSID Case No. ARB/03/10, 17 June 2005; *RosInvestCo UK Ltd. v. The Russian Federation* (Award on Jurisdiction), Arbitration Institute of the Stockholm Chamber of Commerce, October, 2007. For cases contrary to the *Maffezini* reasoning and their implications, see for example: *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan* (Decision on Jurisdiction), ICSID Case No. ARB/02/13, 29 November 2004; *Plama Consortium Limited v. Republic of Bulgaria* (Decision on Jurisdiction), ICSID Case No. ARB/03/24, 8 February, 2005; *Vladimir Berschader and Moise Berschader v. The Russian Federation*, Arbitration Institute of the Stockholm Chamber of Commerce, Case No. 080/2005, Award of 21 April 2006; *Telenor Mobile Communications A.S. v. The Republic of Hungary* (Award), ICSID Case No. ARB/04/15, 13 September 2006. See also *Tza Yup Shum v. The Republic of Peru* (Decision on Jurisdiction and Competence), ICSID Case No. ARB/07/06, 19 June 2009; *Renta 4 S.V.S.A. et al v. The Russian Federation*, Arbitration Institute of the Stockholm Chamber of Commerce, Case No. 079/2005, Award of October 2007.

formulated to serve as interpretative tools or in order to assure some certainty and stability in the field of investment law. The general sense of the Group was that it was premature at this stage to consider the option of preparing draft articles or a revision of the 1978 draft articles.

370. It was also considered that the Group could study further issues concerning the relation between trade in services and in intellectual property, in the context of MFN in the GATT and WTO and its covered agreement, and investment, which remains the focus of the Study Group.

371. Moreover, it was found necessary to identify further the normative content of the MFN clauses in investment, and to undertake a further analysis of the case law, including the role of arbitrators, factors that explain different approaches to interpreting MFN provisions, the divergences, and the steps taken by States in response to the case law. More specifically, it was felt that there should be a systematic attempt to identify areas of conflict and determine whether general patterns could be distilled from the way in which the case law has proceeded in making determinations in respect of MFN-based jurisdiction questions.

372. It was thought necessary to review the types of MFN clauses that have been applied, the types of questions that have been the subject of determination in respect of the MFN clause, as well as to examine the outcomes in the arbitral awards, in light of the rules of treaty interpretation in the Vienna Convention on the Law of Treaties. It was considered that the Study Group had a role to play in contributing to the interpretation of treaties, in particular focusing on the Vienna Convention on the Law of Treaties, as well as in respect of future developments in this field.

373. Against the background work already carried out, further work will be undertaken under the responsibility of the Co-Chairmen of the Study Group to address the issues highlighted above and to put together an overall report, including a framework of questions to be addressed, for consideration of the Study Group next year.

Chapter XII
Shared natural resources

A. Introduction

374. The Commission, at its fifty-fourth session (2002), decided to include the topic "Shared natural resources" in its programme of work and appointed Mr. Chusei Yamada as Special Rapporteur.[1333] A Working Group was also established to assist the Special Rapporteur in sketching out the general orientation of the topic in the light of the syllabus prepared in 2000.[1334] The Special Rapporteur indicated his intention to deal with confined transboundary groundwaters, oil and gas in the context of the topic and proposed a step-by-step approach beginning with groundwaters.[1335]

375. From its fifty-fifth (2003) to its sixty-first (2009) sessions, the Commission received and considered five reports and a working paper from the Special Rapporteur.[1336] At its fifty-eighth session (2006), the Commission adopted, on first reading, draft articles on the law of transboundary aquifers, consisting of 19 draft articles,[1337] together with commentaries thereto.[1338] At its sixtieth session (2008), the Commission adopted, on second reading, a preamble and a set of 19 draft articles on the law of transboundary aquifers,[1339] with a recommendation that the General Assembly: (a) take note of the draft articles and annex them to a resolution; (b) recommend to States concerned to make appropriate bilateral or regional arrangements for the proper management of their transboundary aquifers on the basis of the principles enunciated in the draft articles; and (c) consider, at a later stage, and in view of the importance of the topic, the elaboration of a convention on the basis of the draft articles.[1340] Also between 2003 and 2009, the Commission established five working groups on shared natural resources, the first of which was chaired by the Special Rapporteur and the other four by Mr. Enrique Candioti.

[1333] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10 and Corr.1), paras. 518–519. The General Assembly, in para. 2 of resolution 57/21 of 19 November 2002, took note of the Commission's decision to include the topic "Shared natural resources" in its programme of work. See also Assembly resolution 55/152 of 12 December 2000.

[1334] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), annex, p. 314.

[1335] *Ibid., Fifty-seventh Session, Supplement No. 10* (A/57/10 and Corr.1), para. 529.

[1336] A/CN.4/533 and Add.1 (first report); A/CN.4/539 and Add.1 (second report); A/CN.4/551 and Corr.1 and Add.1 (third report); A/CN.4/580 (fourth report); A/CN.4/591 (fifth report); and A/CN.4/608 (working paper on oil and gas).

[1337] At the 2885th meeting on 9 June 2006.

[1338] At the 2903rd, 2905th and 2906th meetings on 2, 3 and 4 August 2006. At the 2903rd meeting on 2 August 2006, the Commission decided to transmit the draft articles, through the Secretary General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2008. For comments and observations of Governments, see A/CN.4/595 and Add.1. See also Topical summaries, A/CN.4/577, A/CN.4/588 and A/CN.4/606.

[1339] At the 2971st meeting on 4 June 2008.

[1340] See General Assembly resolution 63/124 of 11 December 2008.

B. Consideration of the topic at the present session

376. At the present session, at its 3053rd meeting, on 28 May 2010, the Commission decided once more to establish a Working Group on Shared natural resources, chaired by Mr. Enrique Candioti. The Working Group had before it a working paper on oil and gas (A/CN.4/621)[1341] prepared by Mr. Shinya Murase.

377. At its 3069th meeting, on 27 July 2010, the Commission took note of the oral report of the Chairman of the Working Group on Shared natural resources and endorsed the recommendation of the Working Group (see sect. B.2 below).

1. Discussions of the Working Group

378. The Working Group held 2 meetings on 31 May and 3 June 2010. In the main, it continued its assessment on the feasibility of future work on oil and gas on the basis of a working paper prepared by Mr. Shinya Murase (A/CN.4/621), as well as its previous discussions on the subject.

379. The essential recommendation of the working paper by Mr. Murase was that the transboundary oil and gas aspects of the topic should not be pursued further by the Commission. It was recalled that the topic "Shared natural resources" was included in the programme of work of the Commission on the basis of a 2000 syllabus prepared by Mr. Robert Rosenstock which sketched out the general orientation of the topic, noting that the Commission should focus "exclusively on water, particularly confined groundwater, and such other single geological structures as oil and gas".[1342] However, there was no specific syllabus concerning oil and gas resources. It was for that reason, consistent with the step-by-step approach proposed by the Special Rapporteur, Mr. Chusei Yamada, that following the completion of the work on transboundary aquifers it had become necessary to consider the feasibility of work on oil and gas.

380. In selecting a topic, the Commission was generally guided by established criteria, including: that the topic reflected the needs of States in respect of the progressive development and codification of international law; that the topic was sufficiently advanced in stage in terms of State practice to permit progressive development and codification; and that the topic was concrete and feasible for progressive development and codification.[1343]

381. An analysis of comments received from Governments, as well as statements made in the Sixth Committee, revealed three essential trends: one set of views favoured that the Commission take up work on oil and gas, while another took a middle course, advising a more cautious approach advocating that whatever final position was taken on how to proceed it should be on the basis of broad agreement. Yet another set, expressing a preponderant view, suggested that the Commission should not proceed further with the subject. In the main, the reasons that were advanced for each of these views were varied but

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[1341] The Working Group also had before it: (a) document A/CN.4/607 and Corr.1 and Add.1 and document A/CN.4/633 (comments and observations received from Governments on the questionnaire); (b) A/CN.4/620 (relevant parts of the Topical summary); and (c) a compilation of excerpts from the summary records of the debate in the Sixth Committee on oil and gas in 2007, 2008 and 2009.

[1342] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), annex, p. 314.

[1343] See *Yearbook of the International Law Commission, 1997*, vol. II (Part Two), para. 238; *ibid.*, 1998, vol. II (Part Two), para. 553. It may be recalled that the Commission further agreed that it should not restrict itself to traditional topics, but could also consider those reflecting new developments in international law and pressing concerns of the international community as a whole.

revolved around: (a) the extent to which similarities could be drawn between oil and gas and aquifers; (b) whether the extent to which oil and gas issues were closely intertwined with the bilateral interests of the States posed particular hurdles for codification; (c) whether oil and gas issues could be separated from maritime delimitation; (d) whether oil and gas issues were suitable for codification; and (e) whether the political sensitivity and technical difficulty involved in oil and gas issues might be overcome.

382. The working paper noted that a majority of States was of the view that the transboundary oil and gas issues were essentially bilateral in nature, as well as highly political and technical, involving diverse situations. Doubts were expressed as to the need for the Commission to proceed with any codification exercise on the issue, including the development of universal rules. It was feared that an attempt at generalization would inadvertently lead to additional complexity in an area that may have been adequately addressed through bilateral efforts. Given that oil and gas reserves were often located on the continental shelf, there was also a concern that the subject had a bearing on maritime delimitation issues. Maritime delimitation, which, in political terms, was a very delicate issue for the States, would be a prerequisite for the consideration of this as sub-topic, unless the parties had mutually agreed not to deal with delimitation.

383. Furthermore, it was considered that the option of collecting and analysing information about State practice concerning transboundary oil and gas or elaborating a model agreement on the subject would not lead to a fruitful exercise for the Commission,[1344] precisely because of the specificities of each case involving oil and gas. The sensitive nature of certain relevant cases could well be expected to hamper any attempt at a sufficiently comprehensive and useful analysis of the issues involved.

2. Recommendation of the Working Group

384. The Working Group considered all aspects of the matter taking into account the views of Governments, including as reflected in the working paper by Mr. Murase. In light of the foregoing, it decided to recommend that the Commission should not take up the consideration of the transboundary oil and gas aspects of the topic "Shared natural resources".

[1344] Attempts were made in the 1980s to elaborate model agreements. See Hazel Fox, *et al.*, *Joint Development of Offshore Oil and Gas: Model Agreement for States for Joint Development with Explanatory Commentary* (1989); Hazel Fox, ed., *Joint Development of Offshore Oil and Gas*, vol. 2 (British Institute of International and Comparative Law, 1990); Alberto Szekely, *et al.*, "Transboundary hydrocarbon resources: the Puerto Vallarta draft treaty", *Natural Resources Journal*, vol. 31 (1991), pp. 609 f. (Joint project between a United States university and a Mexican university.) It may be noted that the International Committee on the Exclusive Economic Zone of the International Law Association stopped short of coming up with a model agreement; see "Joint development of non-living resources in the Exclusive Economic Zone", Report of the International Committee on the Exclusive Economic Zone, International Law Association, *Report of the Sixty-third Conference* (Warsaw), pp. 509–569.

Chapter XIII
Other decisions and conclusions of the Commission

A. Programme, procedures and working methods of the Commission and its documentation

385. At its 3037th meeting, on 4 May 2010, the Commission established a Planning Group for the current session.[1345]

386. The Planning Group held five meetings. It had before it Section I of the Topical Summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-fourth session, entitled "Other decisions and conclusions of the Commission"; the proposed Strategic Framework for the period 2012–2013 (A/65/6), covering "Programme 6: Legal Affairs", General Assembly resolution 64/114 on the Report of the International Law Commission on the work of its sixty-first session, in particular paragraphs 7, 8 and 13 to 21; General Assembly resolution 64/116 of 16 December 2009 on the rule of law at the national and international levels, as well as chapter XIII, section A.3, of the report of the Commission at its sixty-first session concerning the consideration of General Assembly resolution 63/128 of 11 December 2008 on the rule of law at the national and international levels.

387. The Commission took note of the proposed Strategic Framework for the period 2012–2013 (A/65/6), covering "Programme 6: Legal Affairs, subprogramme 3, "Progressive development and codification of international law".

1. Settlement of disputes clauses

388. Pursuant to its decision taken at its sixty-first session, the Commission at its 3070th meeting on 29 July 2010 held, under agenda item "Other matters", a discussion on "Settlement of disputes clauses". It had before it a Note on Settlement of disputes clauses, prepared by the Secretariat at the request of the Commission (A/CN.4/623), focusing on topics relating to the settlement of disputes already considered by the Commission and the history and past practice of the Commission in relation to such clauses, taking into account recent practice of the General Assembly. Several points were raised, including the need for the Commission to examine the question of inclusion of settlement of dispute clauses in a set of draft articles on a case-by-case basis, the usefulness of seeking information from regional bodies on the way they address dispute settlement issues and the possible utility of drafting model clauses for inclusion in acceptances of the jurisdiction of the International Court of Justice under article 36 of its Statute. The Commission decided to continue the discussion under "Other matters" at its next session. It was also agreed that Mr. M. Wood would prepare a working paper in advance of the session.

[1345] The Planning Group was composed of Mr. C.J.R. Dugard (Chairman); Members: Mr. L. Caflisch, Mr. E. Candioti, Mr. P. Comissário Afonso, Ms. P. Escarameia, Mr. G. Gaja, Mr. Z. Galicki, Mr. H.A. Hassouna, Mr. M.D. Hmoud, Ms. M.G. Jacobsson, Mr. M. Kamto, Mr. R.A. Kolodkin, Mr. D.M. McRae, Mr. S. Murase, Mr. G. Nolte, Mr. A. Pellet, Mr. A.R. Perera, Mr. E. Petrič, Mr. G.V. Saboia, Mr. N. Singh, Mr. E. Valencia-Ospina, Mr. E. Vargas Carreño, Mr. M. Vázquez-Bermúdez, Mr. N. Wisnumurti, Mr. M. Wood, Ms. H. Xue, and Mr. S.C. Vasciannie (*ex officio*).

2. Consideration of General Assembly resolution 64/116 of 16 December 2009 on the rule of law at the national and international levels

389. The General Assembly, in resolution 64/116 of 16 December 2009 on the rule of law at the national and international levels, *inter alia*, reiterated its invitation to the Commission to comment, in its report to the General Assembly, on its current role in promoting the rule of law. At its sixtieth session, the Commission had occasion to comment comprehensively on its role in promoting the rule of law. The Commission notes that the substance of the comments contained in paragraphs 341 to 346 of its 2008 report (A/63/10) remains relevant and reiterates the comments in paragraph 231 of its 2009 report (A/64/10).

390. The rule of law constitutes the essence of the Commission, for its basic mission is to guide the development and formulation of the law. The Commission notes that the role of the General Assembly in encouraging the progressive development of international law and its codification is reaffirmed in General Assembly resolution 64/116 on the rule of law at the national and international levels. As an organ established by the General Assembly and in keeping with the mandate set out in Article 13 (1) (a) of the Charter of the United Nations, the Commission continues to promote the progressive development and codification of international law. The result of the work of the Commission is presented in its annual report to the General Assembly and debated annually in the Sixth Committee, primarily during the International Law Week. The Commission attaches great importance to the debates and exchange of views between the Commission and Member States of the United Nations and considers that these debates are important tools for the promotion of the rule of law.

391. The Commission has, in particular, taken note of the statement by the President of the Security Council of 29 June 2010 on behalf of the Council, in connection with the Council's consideration of the item entitled "The promotion and strengthening of the rule of law in the maintenance of international peace and security".[1346] The Commission also is committed to the peaceful settlement of disputes and actively supports that Member States settle their disputes by peaceful means as set forth in Chapter VI of the Charter of the United Nations.

392. The Commission is part of what has been characterized as a symbiotic relationship with the International Court of Justice, the highest judicial organ of the United Nations. This is evidenced, for instance, by the annual visit by the President of the Court to the Commission. As stated by President Owada, this visit provides "*an opportunity for interaction between the two most representative legal institutions of the international community working for the consolidation of the rule of law in international relations*".[1347] Time and again, the Court has relied on treaties as binding instruments in themselves and other documents prepared by the Commission as evidence of customary international law. Conversely, the Commission attaches the highest authority to the jurisprudence of the Court; for instance, in its current work on issues such as Reservations to treaties and the Responsibility of international organizations, the Commission has in many cases formulated proposed rules with direct reference to Court decisions or on the basis of arguments by analogy from pronouncements of the Court. The relationship between the Court and the Commission helps to promote the rule of law not only through the consistent and transparent application of clear rules, but also by demonstrating that different law-determining agencies adopt the same approach to the identification of rules of international law. Regional and national courts, too, have been prepared to apply draft rules of the Commission as evidence of international law. Such reference gives enhanced status to the

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[1346] SC/PRST/2010/11.

[1347] This statement is recorded in the summary record of the 3062nd meeting, on 9 July 2010.

relevant draft rules, and underlines the practical nature of the current contribution made by the Commission to the rule of law.

393. The Commission reiterates its commitment to the rule of law in all of its activities.

3. Working Group on Long-term Programme of Work

394. At its 1st meeting, on 4 May 2010, the Planning Group decided to reconstitute the Working Group on the Long-term Programme of Work, under the chairmanship of Mr. Enrique Candioti. The Planning Group took note of an oral progress report presented by the Chairman of the Working Group to the Planning Group on 27 July 2010.

4. Methods of work of the Commission

395. The Commission noted that in view of its full schedule the open-ended working group of the Planning Group on the methods of work of the Commission could not be convened during the current session. The Working Group will be convened early at the sixty-third session of the Commission.

5. Honoraria

396. The Commission reiterates once more its views concerning the question of honoraria, resulting from the adoption by the General Assembly of its resolution 56/272 of 27 March 2002, which have been expressed in the previous reports of the Commission.[1348] The Commission emphasizes that the above resolution especially affects Special Rapporteurs, as it compromises support for their research work.

6. Assistance to Special Rapporteurs

397. The Commission wishes to reaffirm that its Special Rapporteurs have a special role to play in its working methods. The independent character of the Commission accords to its Special Rapporteurs a responsibility to work cooperatively with the Secretariat but also independently of it. While recognizing the invaluable assistance of the Codification Division, the Commission notes that the exigencies and the very nature of the work of Special Rapporteurs as independent experts, which continues year round, imply that some forms of assistance that they need go beyond that which could be provided by the Secretariat. In particular, the writing of the report by the Special Rapporteurs requires various forms of immediate research work associated therewith, the provision of which by the Secretariat located in Headquarters is entirely impracticable. Such work, which constitutes an essential element of the Commission's deliberations, has to be accomplished within the parameters of already existing responsibilities of the Special Rapporteurs in various professional fields, thereby adding an extra burden that may not be easily quantifiable in monetary terms and affecting the conditions of their work. The Commission expresses the hope that the General Assembly will view it appropriate to consider this matter anew in light of the real impact that it has on the proper functioning of the Commission as a whole.

[1348] See *Official Records of the General Assembly, Fifty-seventh Session, Supplement 10* (A/57/10), paras. 525–531; *ibid., Fifty-eighth Session, Supplement 10* (A/58/10), para. 447; *ibid., Fifty-ninth Session, Supplement 10* (A/59/10), para. 369; *ibid., Sixtieth Session, Supplement 10* (A/60/10), para. 501; *ibid., Sixty-first Session, Supplement 10* (A/61/10), para. 269; *ibid., Sixty-second Session, Supplement 10* (A/62/10), para. 379; *ibid., Sixty-third Session, Supplement 10* (A/63/10), para. 358; and *ibid., Sixty-fourth Session, Supplement 10* (A/64/10), para. 240.

7. Attendance of Special Rapporteurs in the General Assembly during the consideration of the Commission's report

398. The Commission notes that, with a view to strengthening its relationship with the General Assembly, the Commission has, on previous occasions, drawn attention to the possibility of enabling Special Rapporteurs to attend the Sixth Committee's debate on the report of the Commission so as to give them the opportunity to acquire a more comprehensive view of existing positions, to take note of observations made and to begin preparing their reports at an earlier stage.[1349] It has also considered that the presence of Special Rapporteurs facilitates exchanges of views and consultations between them and representatives of Governments.[1350] The Commission wishes to reiterate the usefulness of Special Rapporteurs being afforded the opportunity to interact with representatives of Governments during the consideration of their topics in the Sixth Committee.

8. Documentation and publications

(a) *Processing and issuance of reports of Special Rapporteurs*

399. The Commission reiterates the importance of providing and making available all evidence of State practice and other sources of international law relevant to the performance of the Commission's function in the progressive development of international law and its codification. The Commission also wishes to stress that it and its Special Rapporteurs are fully conscious of the need to achieve economies whenever possible in the overall volume of documentation and will continue to bear such considerations in mind. While the Commission is aware of the advantages of being as concise as possible, it strongly believes that an *a priori* limitation cannot be placed on the length of the documentation and research projects relating to the Commission's work.[1351] The Commission stressed also the importance of the timely preparation of reports by Special Rapporteurs for submission to the Commission and delivery to the Secretariat.

(b) *Summary records of the work of the Commission*

400. The Commission noted with appreciation that the edited summary records (incorporating the corrections of members of the Commission, and editorial changes by the Yearbook editors and in the form prior to typesetting and publication) up to 2004 are now placed on the Commission's website and stressed the need to expedite preparation of the summary records of the Commission.

(c) *Trust fund on the backlog relating to the* Yearbook *of the International Law Commission*

401. The Commission reiterated that the *Yearbooks* were critical to the understanding of the Commission's work in the progressive development of international law and its codification, as well as in the strengthening of the rule of law in international relations. The Commission noted with appreciation that the General Assembly, in its resolution 64/114, acknowledged the establishment by the Secretary-General of a trust fund to accept voluntary contributions so as to address the backlog relating to the *Yearbook* of the International Law Commission and invited voluntary contributions to that end.

[1349] *Yearbook ... 1988*, vol. II, Part 2, para. 582.

[1350] *Ibid., ... 1989*, vol. II, Part 2, para. 742.

[1351] For considerations relating to page limits on the reports of Special Rapporteurs, see for example, *Yearbook ... 1977*, vol. II, Part Two, p. 132 and *Yearbook ... 1982*, vol. II, Part Two, pp. 123–124. See also resolution 32/151, para. 10, and resolution 37/111, para. 5, as well as subsequent resolutions on the annual reports of the Commission to the General Assembly.

(d) *Assistance of the Codification Division*

402. The Commission expressed its appreciation for the valuable assistance of the Codification Division of the Secretariat in its substantive servicing of the Commission and its involvement in research projects on the work of the Commission. In particular, the Commission expressed its appreciation to the Secretariat for its preparation of a Survey of multilateral conventions which may be of relevance for the Commission's work on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)" (A/CN.4/630) and of a Note on Settlement of disputes clauses (A/CN.4/623).

(e) *Websites*

403. The Commission once again expressed its appreciation for the results of the activity of the Secretariat in its continuous updating and management of its website on the International Law Commission.[1352] The Commission reiterated that this website and other websites maintained by the Codification Division[1353] constitute an invaluable resource for the Commission in undertaking its work and for researchers of work of the Commission in the wider community, thereby contributing to the overall strengthening of the teaching, study, dissemination and wider appreciation of international law. The Commission notes that the website on the work of the Commission includes information on the current status of the topics on the agenda of the Commission, as well as advance edited versions of summary records of the Commission.

9. Communication from the Chairperson of the African Union Commission on International Law

404. The Commission noted with interest the establishment of the African Union Commission on International Law (AUCIL) and welcomed the willingness of AUCIL to establish cooperation with the Commission.

B. Date and place of the sixty-third session of the Commission

405. The Commission decided that its sixty-third session be held in Geneva from 26 April to 3 June and 4 July to 12 August 2011.

C. Cooperation with other bodies

406. At its 3062nd meeting, on 9 July 2010, Judge Hisashi Owada, President of the International Court of Justice, addressed the Commission and informed it of the Court's recent activities and of the cases currently before it,[1354] drawing special attention to aspects that have a particular relevance to the work of the Commission. An exchange of views followed.

407. The Inter-American Juridical Committee was represented at the present session of the Commission by Mr. Freddy Castillo, who addressed the Commission at its 3047th meeting, on 19 May 2010.[1355] He focused on the current activities of the Committee on global issues as well as issues affecting the region. An exchange of views followed.

[1352] Located at http://www.un.org/law/ilc/.

[1353] See generally: http://www.un.org/law/lindex.htm.

[1354] This statement is recorded in the summary record of that meeting.

[1355] *Ibid.*

408. The Secretary-General of the Asian-African Legal Consultative Organization (AALCO), Mr. Rahmat Bin Mohamad, addressed the Commission at its 3064th meeting, on 14 July 2010.[1356] He briefed the Commission on the recent and forthcoming activities of AALCO. An exchange of views followed. At its 3071st meeting, on 30 July 2010, the Commission decided that it will be represented at the forty-ninth annual session of AALCO, to be held in Dar es Salaam from 5 to 8 August 2010, by Mr. Shinya Murase.

409. The European Committee on Legal Cooperation and the Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe were represented at the present session of the Commission by the Director of Legal Advice and Public International Law, Mr. Manuel Lezertua, and the Chairperson of the Committee of Legal Advisers on Public International Law (CAHDI), Mr. Rolf Einar Fife, who addressed the Commission at its 3067th meeting, on 20 July 2010.[1357] They focused on the current activities of CAHDI on a variety of legal matters, as well of the Council of Europe. An exchange of views followed.

410. On 15 July 2010 an informal exchange of views was held between members of the Commission and the International Committee of the Red Cross on topics of mutual interest, including an outline on current ICRC projects and a presentation on the notion of direct participation in hostilities under international humanitarian law,[1358] as well as issues concerning the topic "Expulsion of aliens". An exchange of views followed.

D. Representation at the sixty-fifth session of the General Assembly

411. The Commission decided that it should be represented at the sixty-fifth session of the General Assembly by its Chairman, Mr. Nugroho Wisnumurti.

412. At its 3075th meeting on 4 August 2010, the Commission requested Mr. Alain Pellet, Special Rapporteur on the topic "Reservations to treaties", to attend the sixty-fifth session of the General Assembly, under the terms of paragraph 5 of General Assembly resolution 44/35.

E. International Law Seminar

413. Pursuant to General Assembly resolution 64/114, the forty-sixth session of the International Law Seminar was held at the Palais des Nations from 5 to 23 July 2010, during the present session of the Commission. The Seminar is intended for advanced students specializing in international law and for young academics or government officials pursuing an academic or diplomatic career or in posts in the civil service in their country.

414. Twenty-six participants of different nationalities, from all the regions of the world, took part in the session.[1359] The participants observed plenary meetings of the Commission, attended specially arranged lectures, and participated in working groups on specific topics.

[1356] *Ibid.*

[1357] *Ibid.*

[1358] Mr. Knut Doerman, Legal Adviser of the ICRC, gave an outline on current ICRC projects, and Mr. Nils Melzer gave a presentation on the notion of direct participation in hostilities under international humanitarian law. Mr. M. Kamto, the Special Rapporteur on the topic "Expulsion of aliens", gave an overview on the topic.

[1359] The following persons participated in the forty-sixth session of the International Law Seminar: Mr. Ilya Adamov (Belarus), Ms. Mónica Addario Dávalos (Paraguay), Ms. Silvina Aguirre (Argentina), Mr. Ricardo Alarcón (Colombia), Ms. Petra Benesová (Czech Republic), Ms. Kalliopi Chainoglou

415. The Seminar was opened by Mr. John Dugard, First Vice-Chairman of the Commission. Mr. Markus Schmidt, Senior Legal Adviser of the United Nations Office at Geneva (UNOG), was responsible for the administration, organization and conduct of the Seminar, assisted by Mr. Vittorio Mainetti, Legal Consultant at UNOG, and Mr. Sébastien Rosselet of the Legal Liaison Office.

416. The following lectures were given by members of the Commission: Mr. Stephen C. Vasciannie: "*The International Law Commission: Patterns of Influence*"; Mr. Zdzislaw Galicki: "*Aut Dedere Aut Judicare Against International Terrorism*"; Mr. Georg Nolte: "*Treaties over Time*"; Mr. Edmundo Vargas Carreño: "*Responsibility of States for Internationally Wrongful Acts*"; Mr. Giorgio Gaja: "*Responsibility of International Organizations*"; Mr. A. Rohan Perera: "*A Comprehensive Convention against Terrorism: Current status of Negotiations*"; Ms. Marie Jacobsson: "*Piracy: Past, Present and Future*".

417. Lectures were also given by Mr. Vittorio Mainetti, Assistant to the Director of the International Law Seminar: "*Introduction to the Work of the International Law Commission*"; Mr. Daniel Müller, Assistant to the Special Rapporteur Mr. Alain Pellet: "*Reservations to Treaties*"; Ms. Jelena Pejič, Legal Adviser of the International Committee of the Red Cross: "*Current Challenges to International Humanitarian Law*"; Mr. Václav Mikulka, Director of the Codification Division: "*Legal Issues arising from State Succession*"; Mr. Markus Schmidt: "*Interdependence of International, Regional and National Human Rights Jurisprudence: Some Reflections*".

418. Two special external sessions were organized in the premises of the University of Geneva and of the Graduate Institute of International and Development Studies of Geneva (HEID). At the University of Geneva, seminar participants attended lectures given by Professor Marco Sassòli: "*Advantages and Disadvantages of International Criminal Justice for the Implementation of International Humanitarian Law*", Professor Robert Kolb: "*Reflections on the Contemporary Role of International Court of Justice (ICJ)*", and Professor Laurence Boisson de Chazournes: "*The International Court of Justice (ICJ) and Experts: The Pulp Mills Case*". At the HEID, seminar participants attended lectures given by Professor Marcelo Kohen: "*Is the Creation of States a Pure Matter of Fact?*" and Professor Vera Gowlland-Debbas: "*The Status of Palestine in International Law*".

419. Seminar participants also attended a session of the Human Rights Committee that was preceded by a briefing on the work of the Committee given by Mr. Markus Schmidt.

420. Two Seminar working groups, on "*Aut Dedere Aut Judicare Against International Terrorism*" and on "*The Future Role of the International Law Commission*", were organized. Each Seminar participant was assigned to one of the two groups. Four members of the Commission, Mr. Enrique Candioti, Mr. Zdzislaw Galicki, Mr. A. Rohan Perera and Mr. Stephen C. Vasciannie provided expert guidance to the working groups. Each group prepared a report and presented its findings to the Seminar in a special session. The reports

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(Greece), Ms. Marlene Da Vargem (Venezuela), Mr. Sridhar Patnaik Dabiru (India), Mr. Michal Drozniewski (Poland), Mr. Ibrahim El-Diwany (Egypt), Mr. George Galindo (Brazil), Mr. Djong-Ra Hankone (Chad), Ms. Mahyad Hassanzadeh-Tavakoli (Sweden), Mr. Heng Liu (China), Ms. Natalie Morris (Singapore), Ms. Inonge Mweene (Zambia), Ms. Regine Ngongue (Cameroon), Mr. Jude Osei (Ghana), Ms. Sana Ouechtati (Tunisia), Mr. Sotaro Ozaki (Japan), Mr. Rodrigo Polanco Lazo (Chile), Mr. Tahirimiakadaza Ratsimandao (Madagascar), Ms. Rampyari Sunuwar (Nepal), Mr. Le Phuong Tran (Vietnam), Mr. Ingo Venzke (Germany) and Mr. Felix Zaharia (Romania). The Selection Committee, chaired by Ms. Laurence Boisson de Chazournes (Professor of International Law at the University of Geneva), met on 26 April 2010 at the Palais des Nations and selected 28 candidates out of 100 applications for participation in the Seminar. Two selected candidates could not attend the seminar.

were compiled and distributed to all participants as well as to the members of the Commission.

421. The Republic and Canton of Geneva offered its traditional hospitality to the participants with a guided visit of the Alabama Room at the City Hall, followed by a reception.

422. Mr. Nugroho Wisnumurti, Chairman of the Commission, Mr. Markus Schmidt, Director of the Seminar, and Mr. Rodrigo Polanco Lazo (Chile) on behalf of the Seminar participants, addressed the Commission and the participants at the closing ceremony of the Seminar. Each participant was presented with a certificate attesting to his or her participation in the forty-sixth session of the Seminar.

423. The Commission noted with particular appreciation that during the last three years the Governments of Austria, China, Croatia, the Czech Republic, Finland, Hungary, Ireland, Lebanon, Mexico, Sweden, Switzerland and the United Kingdom of Great Britain and Northern Ireland had made voluntary contributions to the United Nations Trust Fund for the International Law Seminar. The financial situation of the Fund allowed awarding a sufficient number of fellowships to deserving candidates, especially from developing countries, in order to achieve adequate geographical distribution of participants. This year, full fellowships (travel and subsistence allowance) were awarded to 14 candidates and partial fellowships (travel or subsistence only) were awarded to 4 candidates.

424. Since 1965, year of the Seminar inception, 1059 participants, representing 163 nationalities, have taken part in the Seminar. Of them, 636 have received a fellowship.

425. The Commission stresses the importance it attaches to the Seminar, which enables young lawyers, especially from developing countries, to familiarize themselves with the work of the Commission and the activities of the many international organizations which have their headquarters in Geneva. The Commission recommends that the General Assembly should again appeal to States to make voluntary contributions in order to secure the holding of the Seminar in 2011 with as broad participation as possible.

426. The Commission noted with satisfaction that in 2010 comprehensive interpretation services were made available to the Seminar. It expresses the hope that the same services would be provided at the next session, within existing resources.

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